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CONRAIL SALE AMENDMENTS ACT OF 1985

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Mr. DANFORTH, from the Committee on Commerce, Science, and Transportation, submitted the following

REPORT

together with

MINORITY VIEWS

[To accompany S. 638]

The Committee on Commerce, Science, and Transportation, to which was referred the bill (S. 638) to amend the Regional Rail Reorganization Act of 1973 to provide for the transfer of ownership of the Consolidated Rail Corporation to the private sector, and for other purposes, having considered the same, reports favorably thereon with amendments and recommends that the bill as amended do pass.

PURPOSE OF THE BILL

The purpose of the legislation is to return the Consolidated Rail Corporation (Conrail) to the private sector through the implementation of the Secretary's Plan to sell the common stock of Conrail to Norfolk Southern Corporation (NS). In implementing this plan, the bill is intended to ensure that the Memorandum of Intent, which includes the financial and service covenants negotiated between NS and the Department of Transportation (DOT), becomes the definitive agreements unless Congress is otherwise notified, and that no sale is consummated until the Department of Justice has approved the proposed divestiture of certain lines by NS. Furthermore, the bill is intended to continue to the maximum extent appropriate and feasible existing service arrangements, including contracts, and to provide for certain labor protection and labor rights in the existing Conrail employee stock ownership plan. Finally, the legislative retires the debt now owed the Federal Government by Conrail, clarifies the application of certain tax provisions

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to the sale, provides for the removal of existing provisions applicable to Conrail that are no longer appropriate for a private-sector railroad, and continues the jurisdication of the special court over disputes, including certain third-party claims, relating to Conrail.

Background and Needs

CREATION OF CONRAIL

During the 1960's the financial condition of the railroad industry deteriorated signficantly, particularly in the Northeast and Mideast. Between 1967 and 1973, eight railroads opeating in those regions entered into bankruptcy proceedings, the most notable of those being the Penn Central Transportation Company. Congress responded to this crisis with the enactment of the Regional Rail Reorganization Act of 1973 (3–R Act), which created the United States Railway Association (USRA), a nonprofit Government corporation charged with the responsibility of formulating a plan to restructure the bankrupt railroads into a financially self-sustaining rail service system.

In response to its mandate in the 3–R Act, USRA formulated a final systems plan which provided for the transfer of rail properties owned by seven bankrupt railroads to Conrail. To implement this plan, Congress passed the Rail Revitalization and Regulatory Reform Act of 1976 (4–R Act).

Conrail began operations in April 1976 as a for-profit corporation organized under the laws of Pennsylvania pursuant to the 4–R Act and now operates over 14,200 route miles in 15 States and hauls 15 percent of the Nation's rail freight traffic, including coal, chemicals, metals, automobiles, food products and paper. It was authorized to issue debentures, preferred and common stock, and certain contingency notes. USRA was appropriated Federal funds with which to invest in these debentures and stock so as to provide Conrail with funds for rehabilitation of its rail properties and other capital needs. Also under the 4–R Act, USRA was given the responsibility for monitoring Conrail's financial performance. A special court established pursuant to the 3–R Act was to resolve any valuation disputes relating to the transfer of properties to Conrail.

In creating Conrail as a quasi-governmental corporation, Congress hoped that it would become self-sustaining. However, that clearly did not occur—since its creation in 1976, the Federal Government has invested nearly $7 billion in Conrail, to cover (among other things) capital operations and labor protection.

In 1980, Congress realized that Conrail was continuing to lose money and provided further Federal financial assistance for Conrail in the Staggers Rail Act of 1980 (Public Law 96–448). Congress also mandated in that act several studies of Conrail's future and of possible solutions to Conrail's financial dilemma. The studies were to be conducted by DOT, USRA, Conrail and the Interstate Commerce Commission (ICC).

THE NORTHEAST RAIL SERVICES ACT OF 1981

From the studies mandated by the Staggers Act, two possible solutions emerged as ways for dealing with Conrail—either keep it

intact and provide further Federal financial assistance coupled with certain cost reductions, or break it up and transfer its lines to other carriers. The Northeast Rail Services Act of 1981 (NERSA) resulted from Congress' analysis of those proposed solutions.

Specifically, NERSA directed DOT, with the aid of an investment banker, to sell the Federal Government's common stock interest in Conrail. Further, the act ensured that all best efforts would be made to sell Conrail as an entity. Conrail could be sold in pieces only if USRA determined that Conrail was not or would not be profitable, that further Federal assistance would be required in addition to that authorized in the act, or that Conrail could not be sold as an entity.

In addition, the act included certain provisions to allow Conrail to reduce its costs and become more attractive for a sale as an entity. An expedited abandonment procedure was established to permit Conrail to shed many of its low-volume, high-cost branchlines. Also, NERSA provided for the phase-out of the labor protection program established in title V of the 3-R Act, and replaced it with a less costly program. In addition, Conrail was directed to reduce its labor force, and the act authorized funds to cover termination allowance for those employees who were terminated. Further, the act encouraged management and labor to agree to wage and benefit reductions. Provisions were also included to facilitate the transfer of Conrail's commuter services to the area localities by January 1, 1983. Finally, Conrail was exempted under the act from State taxes.

FINANCIAL AND OPERATIONAL CONDITION OF CONRAIL SINCE NERSA

Since the passage of NERSA, Conrail has taken the actions mandated and allowed under the act, has improved its financial position, and has not needed Federal funds for its operations since 1981.

Specifically, between 1981 and 1983 it reduced its route mileage by 25 percent and its employment by 3,050 to a work force of less than 40,000. Its employees agreed to 12 percent wage comcessions for 3 years, which resulted in approximately $400 million of savings. With these and other changes, Conrail in 1983 benefitted for the first time from the double effect of cost reductions and improvement in revenues. For 1983, it reported net income of $313 million on revenue of $3.1 billion, which represents an increase in income of 80 percent over the previous year. Also, Conrail substantially increased its cash flow to $541 million in 1983, permitting it to obtain a $100 million unsecured line of credit and to proceed with a solid capital program.

These financial and operational improvements made it possible for Conrail to be sold as an entity. Under NERSA, USRA was directed to make two determinations of Conrail's profitability—one in June 1983 to assess whether Conrail would become profitable, and the other in November 1983 to conclude whether Conrail had been profitable during those intervening months. Both of USRA's determinations in this regard were positive. USRA concluded that Conrail was generating sufficient revenue and cash to cover expenses and capital needs and to attract outside credit. Because of

these determinations, DOT was to use all best efforts to sell Conrail as an entity, as mandated by NERSA.

SALE PROCESS

Section 401 of NERSA outlined the procedure and the criteria for selling Conrail as an entity. Specifically, it directed the Secretary of Transportation to arrange for the sale of Federal Government's interest in the common stock of Conrail. It also directed the Secretary to hire an investment banking firm to assist in making the sale arrangements. Further, it specified that the sale plan should promote competitive bidding, ensure continued rail service, and maximize the return to the Federal Government on its investment.

As required by NERSA, Secretary Drew Lewis, in May 1982, hired Goldman Sachs as DOT's financial advisor to help solicit and evaluate offers for Conrail. In turn, to meet NERSA's competitive bidding requirement, the new DOT Secretary, Elizabeth Dole, and Goldman Sachs in 1983 and 1984 contacted over 100 corporations and other investors about making offers for Conrail. The solicitation process began in the spring of 1983 when 20 entities were contacted. This was at a time when both Conrail and the economy were starting to show signs of recovery. However, this round of contacts produced only one potential purchaser, Santa Fe Industries, Inc., which later dropped out of consideration to pursue the purchase of another railroad. In the meantime, the Railway Labor Executives' Association (RLEA) submitted an offer to the Secretary. Further, at Secretary Dole's request, Goldman Sachs reviewed the possibility of selling Conrail by means of a public offering. Goldman Sachs advised the Secretary that RLEA's purchase price was inadequate, and that the success of a public offering would depend, among other things, on uncertain market conditions in the future.

In December 1983 and January 1984, when both Conrail and the economy were showing strong operating results and prospects, approximately 110 entities were contacted. This round of contacts produced an offer from Alleghany Corporation, public expressions of interest from NS and CSX Corporation (CSX), and private expressions of interest. At the request of the Secretary, Goldman Sachs evaluated the financial terms of Alleghany's offer. In a letter to the Secretary dated April 18, 1984, Goldman Sachs concluded that Alleghany's purchase price was within the range of providing fair compensation to the Federal Government. Further, Goldman Sachs suggested that it would be an appropriate time for the Secretary to invoke a sixty-day time period to elicit other offers.

After receiving this advice, Secretary Dole established June 18, 1984 as the deadline for submitting additional offers to purchase Conrail. The deadline was set in part to end the lengthy solicitation phase of the sale process, and in part to be fair to potential purchasers, like Alleghany, who had tied up investment funds in anticipation of entering into negotiations with DOT. On June 18th, Secretary Dole received 15 offers for Conrail. Among those making offers were RLEA, Alleghany, NS, CSX, Guilford Transportation Industries Inc. (Guilford), Citicorp, Mr. J. W. Marriott, Jr. and the Bass Brothers (J. W. Marriott).

After receiving the offers, Secretary Dole began to analyze them for the purpose of deciding which of them best met the NERSA sale plan criteria. In addition, in order to ensure long-term rail service and employment stability, she determined that the offer to be selected would have to leave Conrail in the strongest financial position after the sale. Accordingly, she analyzed among other things the financial strength of the offerors and financial projections for the combined entity. Further, she analyzed each offer to determine whether it would increase or decrease to service shippers and communities. To ensure that the offer to be selected would maximize the return to the Federal Government, she analyzed each offer in terms of its direct purchase price and its Federal tax impact.

Upon completing the initial analysis, Secrtary Dole began negotiations with all the offerors. She used the negotiations to discuss the possible inclusion of financial and service covenants in the sale plan and an increase in the price to be paid for Conrail. In addition, she used the negotiations to narrow the list of offerors. During this period, representatives of railroad labor also met with various offerors to discuss wage and labor protection terms and how to handle labor's 15 percent stock ownership interest in Conrail, which was acquired through an employee stock ownership plan (ESOP).

In July 1984, Secretary Dole narrowed the list of offers to six, and in September to three. The three final offers belonged to Alleghany, NS, and J. W. Marriott. Each of the offers included a cash payment of at least $1.2 billion and the surrender of certain accumulated Conrail tax benefits; compensation to railroad labor for their past wage concessions and for their 15 percent interest in Conrail; and certain financial and service covenants. The Secretary's negotiations with the three offerors continued through the fall. In addition, in September, she asked the Treasury Deparment to review further the Federal tax imapct of the three offers, and asked the Department of Justice (Justice) to review the competitive impact of the NS offer.

On January 4, 1985, Conrail management submitted a public offering proposal to Secretary Dole that provided for a $1.4 billion payment to the Federal Government. Under the proposal, the funds for the purchase price would be derived from taking $300 million of cash from Conrail, and from selling $600 million of Conrail preferred stock and $500 million of Conrail common stock.

On January 29, Justice reported back to Secretary Dole on the competitive impact of the NS offer. Justice concluded that in order to maintain competition in specified corridors NS would have to divest some rail lines and facilities to other rail carriers in the Conrail region and meet certain other conditions. NS advised Secretary Dole that if she selected them to purchase Conrail, they would agree to the conditions set by Justice.

On February 8, Secretary Dole announced that she has selected NS to purchase Conrail, because she believed NS's sale plan best met the NERSA criteria, and ensured that Conrail would be left in the strongest possible financial position after the sale. She also announced that NS and DOT had signed a Memorandum of Intent (MOI) (printed as an Appendix to this report) that reflected the

terms and conditions of the purchase. The MOI provided that NS would pay at least $1.2 billion in cash to the Federal Government for its 85 percent interest in Conrail, and would surrender certain Conrail tax benefits valued at $2.4 billion. The MOI also provided that NS would pay $375 million in cash or NS stock to the Conrail employees for their 15 percent interest in Conrail and for past wage concessions; would increase Conrail employees' wages to industry-wide levels; would pay up to 6-years labor protection to any NS or Conrail employee whose job was adversely affected by the purchase; and would pay 1-year of labor protection to those employees whose jobs were adversely affected by other efficiencies during the first 3 years. Further, the MOI contained a number of 5-year service and financial covenants, including ones requiring NS to operate Conrail's business substantially as it now is being operated; to spend a minimum of $350 to $500 million annually on Conrail's capital plant; to refrain from paying dividends unless a minimum cash balance of $500 million would remain afterwards; to maintain Conrail's Philadelphia headquarters and repair facilities at Altoona, PA; and to maintain or reestablish through routes and joint rates with small eastern railroads. In addition, the MOI conditioned the purchase on NS's meeting the conditions established by Justice for the divestiture of certain rail lines.

Following her announcement, Secretary Dole forwarded to Congress her recommendation that NS purchase Conrail, the MOI, and draft legislation to implement the purchase.

Legislative History

The Commerce Committee held 4 days of hearings on the sale of Conrail. On June 20, 1984, the Surface Transportation Subcommittee held the first hearing to examine the process used by Secretary Dole to solicit and evaluate offers for Conrail. On February 27 and 28, 1985, the full Committee held hearings to review the Secretary's recommendation to Congress that NS purchase Conrail. The Committee examined the reasons for the Secretary's selection of NS, the impact of NS's purchase on interested parties, and the viability and desirability of selling Conrail by means of a public offering. On April 4, 1985, the full Committee held a hearing to consider the impact of NS's purchase on midwestern railroads.

Over 30 witnesses testified during the hearings. They included members of the U.S. Senate, and representatives of the DOT, Justice, and Treasury; the USRA; Conrail management; railroad employees; shippers; other railroads; and investment bankers. In addition, a number of interested persons submitted written statements for the record.

On March 7, 1985, Chairman Danforth introduced on behalf of himself and Senator Hollings S. 638, a bill to implement the sale of Conrail to NS.

On April 18 and 30, 1985, the Committee met in open executive session to consider S. 638. On April 30, the Committee by voice vote agreed to seven amendments offered en bloc by Senator Danforth. Senator Danforth's amendments: (1) clarify the definition of "Secretary's Plan"; (2) tighten the provision directing the Secretary to negotiate "definitive agreements" that conform to the MOI; (3) add a

provision clarifying that the Secretary cannot transfer the Federal Government's interest in Conrail to NS until Justice has approved the required divestitures; (4) add a provision directing the Secretary to give notice to Congress if any convenants are waived or if the definitive agreements alter the terms of the MOI; (5) add a provision directing the Secretary to submit annual reports to Congress on NS's compliance with the covenants; (6) add a provision clarifying that Conrail's contracts will be honored after the sale; and (7) add a provision allowing injured parties to file complaints with the Secretary regarding alleged violations of the covenants.

In addition, the Committee by voice vote agreed to two amendments offered by Senator Ford and one amendment offered by Senator Long on behalf of himself and Senator Kasten. Senator Ford's amendments provide for the right of first hire on NS and Conrail for employees of other railroads who are adversely affected by the sale, and the right to cross crafts on NS and Conrail for employees of these two railroads who are adversely affected by the sale. Senator Long's amendment requires NS to continue to operate Conrail in compliance with a provision of existing law requiring reduced rail rates for recyclable materials.

The Committee by a rollcall vote of 3 yeas and 14 nays rejected an amendment offered by Senator Pressler to require NS to maintain existing joint rates and establish new joint rates and contract rates with a number of small and midsized railroads.

The Committee by a rollcall vote of 12 yeas and 5 nays ordered S. 638, as amended, to be reported favorably.

Summary of Major Provisions

Implementation of the Secretary's Plan

The main purpose of S. 638, as reported, is to implement Secretary Dole's plan to sell the common stock of Conrail to NS, as authorized in section 104 of title I of the bill. In this regard, section 4 of the bill defines the "Secretary's Plan" as the MOI entered into between the United States and NS on February 8, 1985, and any divestitures by NS of track, facilities and rights in accordance with the Justice letter sent to Secretary Dole on January 29, 1985.

With respect to implementation, the legislation directs in section 104(b) that the Secretary shall implement the Secretary's Plan by negotiating and performing definitive agreements which shall conform to the MOI. In the event that there is deviation from the MOI, the Secretary shall transmit to Congress a notification of such alteration, which would not become effective until 45 days after the date of notification. Finally, no transfer to NS can take place until the divestitures by NS as required by the Justice letter are approved by the Attorney General.

In approving the authorization for the Secretary's Plan, the Committee carefully considered the criteria established in NERSA to ensure continued rail service, promote competitive bidding, and maximize the return to the Federal Government on its investment. In this regard, the Committee also examined the criteria established by the Secretary to be applied to any selection of a purchaser: assurance that Conrail would be in the strongest possible finan-

cial position after sale; confidence that rail service would be protected; and, consistent with the former two goals, the provision for a reasonable return to the Federal Government. The plan to sell Conrail to NS clearly meets these criteria.

In particular, a sale to NS will provide the financial strength of a rail system in the Conrail region, which will ensure continued rail service in the interest of shippers, communities and labor alike. Furthermore, the sale plan includes the public interest covenants incorporated in the MOI, which will protect the financial integrity of the combined system, ensure continued rail service, and provide for important labor protection. Finally, a sale to NS will provide a reasonable return to the Federal Government, clearly established through a competitive bidding process. No other alternatives present the strengths and certainty of the Secretary's Plan.

FINANCIAL VIABILITY

The ability to secure Conrail's long-term financial stability is one of the most compelling arguments for the sale to NS. The NS purchase brings more strength to Conrail—and takes less from it—than any of the other options presented to DOT or considered by the Committee. And while one can construct various public offering scenarios, it is simply undeniable that an NS-Conrail combination is financially stronger than Conrail standing alone and provides a financial margin of safety to ensure better survival through difficult economic periods.

Financial strength is more than an actuarial consideration. Financial strength is an essential element in conrail's ability to provide vital services to shippers and communities within its region. It is the best guarantee of long-term employment stability for Conrail's workforce.

In evaluating the benefits of a combination of NS and Conrail in terms of financial stability, the key question is whether Conrail is financially secure enough to exist alone. One of the first elements in this evaluation is a review of Conrail's profit picture.

Conrail is clearly a well-managed corporation. It has now generated book profits in each of the past 4 years. But it is essential to recognize that Conrail's recorded—and projected—profits overstate its actual position for several reasons.

First, a major share of the profits recorded by Conrail over the past 4 years resulted solely from Government ownership. Because of that special status, there are a significant number of Conrail obligations that have either been forgiven or paid directly by the Federal Government. Each of these special privileges is reflected on a dollar-for-dollar basis in Conrail's final profit and loss calculations.

For example, Conrail, by virtue of a provision in NERSA, is exempted from a wide range of State taxes, which has saved the corporation between $26 and $32 million dollars each year. The Federal Government also pays all of Conrail's labor protection, a payment that has ranged between $20 and $120 million per year. Conrail has, over a period of years, paid its employees 12 percent less in wages than its competitors as a consequence of the 1981 wage reduction agreement, which has added $120 to $130 million each

year to Conrail profits. Furthermore, Conrail is a potential Federal taxpayer (though not a State taxpayer), and it has used its large net operating loss carry forwards as well as its inventory of investment tax credits to shelter the income it earned in recent years.

A privately-owned Conrail, without these advantages, would have suffered substantial losses, rather than recording profits, in 1981 and 1982, and its profits in succeeding years would have been far below the levels achieved under Government ownership.

It is also important to review cash flow in assessing the financial health of a rail carrier. Railroads are compelled, by the nature of their operations, to make major annual investments in track and equipment. A significant share of these investment dollars are entered on the corporation's books after the calculation of "net profits." Consequently, as USRA observed in its April 1985 report, cash flow, rather than net profit, is "* * * the best single measure to assess Conrail's future prospects." By any objective criteria, Conrail's projected cash flows over the remainder of its 5-year plan are a cause for serious concern.

In its April 1985 report, USRA projected that Conrail would generate an average annual net cash flow of $39,600,000 over the remainder of its 5-year plan. Since that 3-year period encompasses what Conrail projects to be its best (1988) and its worst (1986) years, these figures provide a good benchmark for gauging the railroad's potential performance over a range of economic conditions.

For a railroad with a $3.5 billion revenue base, $39,600,000 in positive cash flow is an extremely marginal return. Of greater concern is the fact that these figures incorporate an assumption that Conrail will succeed in liquidating an average of $33 million in surplus property and equipment each year. While the Committee does not question the reasonableness of those estimates, Conrail's ability to enhance its cash flow through property liquidation is clearly a finite process. The fact that Conrail can generate only $6 million annually in marginal cash flow from operations, against a $3.5 billion base, is a clear and present danger sign.

Thus, while Conrail's current profit picture may appear to be positive, it must be put in perspective when compared to its picture if it were a private-sector company. As a privately-owned company, its financial picture would not be positive. That assessment, coupled with a marginal cash flow, does not present a secure financial picture.

In addition to Conrail's current financial picture, it is important to look at its future financial performance. In this regard, USRA's estimates, based on Conrail's own projections, suggest that Conrail will only generate a positive cash flow from operations of less than $10 million annually over the remainder of its current 5-year plan. Even when the anticipated return from sales of Conrail property are included, average cash flow remains under $40 million annually, despite Conrail's $3.5 billion dollar gross revenue base.

In making such projections, it is important to keep several factors in mind, all of which tend to support a less positive picture. Primary among those factors is the evolving character of the Northeast regional economy. For the past twenty years, Conrail's traffic base has eroded at an annual rate of 3.6 percent. Between 1977 and 1984, Conrail's tonnage declined by 27.9 percent, and its

carloads declined by 37.3 percent. Although Conrail's current projections assume stabilization and reversal of that trend, there is no tangible evidence to support that thesis in this increasingly service-oriented region. Despite recent improvements in Conrail's financial performance, one simply cannot discount the potential for continued declines in the carrier's traffic base. Any further contraction would have serious implications for Conrail's financial prospects, as well as its continued service capacity.

Furthermore, the rail industry continues to be faced with intense intermodal competition from trucks and trucking subsidiaries of rail carriers. This type of truck-rail competition will intensify in future years, a trend that does not bode well for Conrail's ability to remain a stand alone entity over the long term. Because of the nature and concentration of its industries, an excellent highway system, and the close proximity of its major shipping centers, Conrail will be the primary target of intermodal diversion in future years.

Finally, it is essential to recognize that in an industry where economies are long haul and a diversified traffic base is essential to surviving economic fluctuations, Conrail is both a terminal and a merchandise carrier. Its merchandise traffic base is highly volatile in economic cycles, a factor magnified by its status as a terminal carrier. One cannot escape the fact that Conrail has the shortest hauls, the fewest coal reserves, and one of the most expensive physical plants of the Nation's regional carriers.

Thus, the nature of the Northeast economy and Conrail's traffic base are such that questions must be raised about Conrail's future and its ability to remain viable as more than a marginal carrier. The concern raised about the strength of Conrail's current financial picture, together with the doubts raised about the traffic base that would sustain Conrail in the future at the very least raises a question about Conrail's viability without curtailing service and employment or without additional resources and funds. Moreover, most of the steps that Conrail could take to reduce costs have already been taken.

The NS purchase provides much more certainty about Conrail's future because of the additional resources and funds that it can offer and because of the transportation benefits tht the combination brings. This purchase strengthens Conrail in a number of ways:

1. NS brings Conrail substantial cash resources and borrowing capacity. Equally important, the fact that NS has purchased controlling interest in Conrail maximizes the probability that it will bring those resources to bear on Conrail's behalf should the need arise. NS's interest in Conrail is clearly long term, and thus NS will have an incentive to bring additional resources if necessary, unlike other alternatives which would disperse ownership among many shareholders who would not have as much incentive to provide such additional resources.

2. Conversely, the NS purchase has no negative impact on Conrail's cash reserves or equity position. It neither draws down Conrail's cash, nor uses its assets as collateral. Unlike a public offering, it is not dependent upon the payment of dividends to create a public market for the stock.

3. NS's ability to offer longer, single-line service over its expanded route system will bring a significant level of additional volume onto the Conrail system and will provide clear benefits to shippers, as various shippers testified at the Committee's hearings. DOT estimates project that volume to be approximately $230 million annually, drawn by NS's ability to offer shippers lower rates and faster turnaround times. Additional volume is the most effective guarantee of employment and financial stability for Conrail over the long term.

4. The synergies of the combined system will enable Conrail to lower its operating costs, borrow on more favorable terms, and better utilize its rolling stock.

5. The combined system will broaden and stabilize Conrail's traditionally recession-sensitive traffic base. The significance of this factor was emphasized during the first 90 days of 1985, when a small fluctuation in shipping volume drew Conrail more than $40 million under budget, and diminished its cash reserves.

6. The combined system, with its longer hauls and better market access, is significantly less susceptible to truck diversion than a stand alone Conrail. In fact, because of its single-line, long-haul traffic, NS may well be able to recapture traffic that has been lost to trucks.

Of all the options available to the Committee, the NS purchase provides the best guarantee of service, jobs, and financial stability for Conrail over the long term. For the same reasons, it provides the best assurance that Conrail will not return to Federal Government ownership.

FINANCIAL AND SERVICE COVENANTS

To further ensure the financial strength and continued service levels of a combined NS-Conrail system, the Secretary negotiated the MOI with NS which includes several important financial and service covenants. Because of the importance of these covenants, the Committee expects that they will be incorporated in their entirety into the definitive agreements entered into between NS and the Secretary to consummate the sale.

The important financial covenants are as follows:

(1) a requirement that NS preserve Conrail's existing plant condition and not allow deferred maintenance;

(2) an agreement to spend a certain amount annually on capital programs;

(3) a prohibition against depleting Conrail's cash below $500 million;

(4) certain restrictions on stock issuance and dividend distributions;

(5) a limitation on the termination of the existing Conrail pension plan; and

(6) the requirement for quarterly and annual financial submissions to DOT.

The financial covenants ensure that NS does not use Conrail cash and resources to help the NS system but rather maintains the resources that Conrail already has and provides the additional resources which make the NS purchase the best alternative. Thus,

NS must maintain a Conrail capital program and avoid deferred maintenance. Furthermore, NS could not deplete Conrail's cash below a certain level and can only distribute dividends if enough cash is on hand.

The important covenants to preserve rail service are as follows:

(1) a requirement that NS continue Conrail's rail business substantially as it is now;

(2) a condition that NS retain ownership control;

(3) a prohibition against the sale or transfer of a substantial part of Conrail;

(4) the elimination of the expedited abandonment procedure;

(5) certain restrictions on future mergers;

(6) the retention of the Conrail headquarters in Philadelphia;

(7) an agreement to maintain or re-establish routes with small eastern carriers of less than $300 million in annual revenues; and

(8) a requirement that NS file quarterly compliance certificates with DOT.

The service covenants will ensure that the level of service that Conrail now provides will be essentially maintained and that Conrail will be retained as an entity. Specifically, there would be restrictions on any sales, transfers, or mergers, and certain routes would have to be maintained. Furthermore, any abandonment of service would be approved under regular ICC abandonment procedures. To ensure that NS's interest in Conrail over the long term is maintained, NS will have to retain ownership control. Finally, as to maintenance of existing rail service, the covenants provide for the maintenance of the maximum level of rail freight services throughout the system that is economically justifiable. The Committee intends that any dispute as to whether particular rail freight service is "economically justifiable" shall be determined by the Secretary after hearing the views of Conrail shippers and communities and taking into account the goals of preserving existing patterns of service and rail-to-rail competition.

These financial and service covenants are enforceable for five years. The legislation as originally introduced provided the Secretary with the exclusive authority to enforce these covenants through an injunction in the special court. To ensure further the implementation of these covenants, the Committee included an amendment providing third parties with the right to ask the Secretary to enforce them. The Committee expects adherence to these covenants.

The Committee believes that these covenants make the already strong NS proposal even stronger. No sale of Conrail could be approved without these financial and service protections.

EFFECT ON EMPLOYEES

In addition to the financial viability of the future rail system in the Conrail region and the continuation of rail service in that region, the Committee was also concerned in evaluating the Secretary's Plan about the impact of a NS purchase on employees, both on the combined NS-Conrail system and off the system. After re-

viewing the plan, the Committee believes that the proposal is the best alternative for the employees.

A critical concern in this regard is the extent to which a combination of these two railroads would cause employee layoffs on the combined system. In testimony before the Committee, NS stated that it expected no more than 1,200 jobs on Conrail and NS would be adversely affected by the sale, and that the annual attrition rate on both NS and Conrail was in excess of 1,200. This number is certainly less than the 4,500 jobs which Conrail predicts it would eliminate under its 5-year plan. It also is low compared to the number of jobs eliminated since Conrail's creation in 1976. Since 1976, employment on Conrail has dropped from 99,000 to 39,000, which represents a decline in all employees of 63.2 percent and a decline in freight employees of 59 percent.

Furthermore, for those Conrail employees who lose their jobs as a result of this purchase, the implementing legislation provides for labor protection amounting to a guarantee of 6-years pay (the so-called New York Dock protection). Also, NS has agreed with labor that any employees who lose their jobs during the first 3 years because of other efficiencies will be guaranteed 1 year pay. Finally, the Committee included an amendment in section 303 of the implementing legislation which provides that any employee on the NS-Conrail system who is deprived of employment as a result of the implementation of the Secretary's Plan shall have the first right of hire anywhere on the system regardless of craft or class, without losing his or her seniority in the original craft or class.

With respect to employees of the NS-Conrail system, the Committee adopted an amendment in section 109 of the bill providing that any employee of any railroad who is deprived of employment as a result of the implementation of the Secretary's Plan shall have the right of first hire for any vacancy on the NS-Conrail system in his or her craft or class. The Committee believes that this amendment adds significant protection that would otherwise not be provided.

In examining the NS purchase, the Committee received testimony from segments of rail labor indicating support for alternatives other than the NS purchase, including the notion of a public offering. Given the financial strength and new traffic opportunities that NS brings to Conrail (which will result in fewer layoffs; the prognosis for layoffs if Conrail remains a stand alone entity; and the protections afforded the employees by the NS purchase, the Committee believes that the NS purchase clearly provides the best alternative for rail labor.

RETURN TO THE FEDERAL GOVERNMENT

Consistent with the other goals of financial strength, continued rail service, and protection for the employees, another goal in the sale of Conrail was to ensure a reasonable return on the Government's investment in Conrail. The Committee believes that the proposed sale to NS does provide a reasonable return, and furthermore, that the return, together with the other strengths of the NS purchase, makes it the best alternative.

The NS purchase assumes a sales price of $1.2 billion plus additional cash at closing. Concerns have been raised that this price is

too low, given the almost $7 billion that the Government has invested in Conrail and the cash that Conrail has on hand which NS would asssume. In examining this concern, the Committee sought testimony from various investment bankers as to how a purchase price would be arrived at in a similar private-sector transaction. In essence this figure was arrived at based on the business assessment of a number of bidders as to an appropriate price, which coincided with the assessment of Goldman Sachs, DOT's investment banker—that is, what a willing buyer will pay a willing seller. Thus, this price was established as would be any price in any business deal.

In this regard, concern has been raised that the price does not reflect the salvage value of the Conrail assets. The Committee believes that this concern is ill-founded. Conrail is not being sold for scrap but rather as a going concern. It is clear that the purchase price included in the NS proposal reflects a competitive bidding process for a going concern.

In evaluating the return to the Federal Government from the NS purchase, one must also consider the surrender of various tax benefits now available to Conrail—the net operating loss carryforwards and the investment tax credits. Furthermore, NS has agreed to a number of financial and service covenants which would not normally be required in a private-sector deal. In particular, NS is not free to deplete Conrail's cash as it will—a certain level of cash is to remain in Conrail for Conrail. Covenants such as this one have value, though difficult to quantify, and thus clearly influence the ultimate value to both the buyer and the seller.

Thus, the Committee believes that the NS purchase provides a reasonable return to the Federal Government. Furthermore, the Committee views the return to the Government only as one, and clearly not the most important, factor in the sale of Conrail.

TIMING OF THE SALE

One continuing question raised throughout the examination of the Secretary's Plan is whether now is the right time to sell Conrail, or whether given Conrail's positive financial picture a better deal could be had at a later date. The Committee believes that now is the appropriate time to sell Conrail, and further that the NS purchase affords the best alternative for selling Conrail now.

In determining whether now is the appropriate time to sell Conrail, one must consider the financial projections for Conrail over the next few years. Given the vicissitudes of the Northeast economy, the Committee believes that to wait to sell could risk an economic downturn that could find Conrail without a willing purchaser, and more importantly without the additional financial and operational resources that NS can bring to the Conrail system. Furthermore, as indicated by the testimony of various investment bankers before the Committee, the appropriate time to sell Conrail or any other business is when its financial picture is positive, and when the marketplace has produced willing buyers. Now is the time to sell Conrail, and to sell it to NS.

COMPETITIVE EFFECTS

NERSA requires that any plan to sell Conrail ensure continued rail service. In reviewing the impact of the NS purchase on rail service, the Committee gave special attention to the issue of whether the purchase would reduce competition. The Committee solicited testimony on the issue from Justice, DOT, shippers, NS, and other railroads. Based on the testimony and other information, the Committee believes that with the divestiture of rail lines mandated by Justice competition would not be reduced. In fact, the divestiture actually may enhance competition by providing additional strength to two of Conrail's regional competitors—Guilford and the Pittsburgh and Lake Erie (P&LE). Further, the divestiture to Guilford will result in a new rail alterntive between New England and the midwest. Competition also would be enhanced by NS's agreements to reopen many of the joint routings closed by Conrail and to maintain joint routings that NS and Conrail now have with other railroads. Finally, the sale to NS would enable it to be competitive with CSX throughout the Northeast. At present, NS's lines do not extend north of Washington, DC or east of Pittsburgh, PA and Buffalo, NY.

JUSTICE DEPARTMENT ANALYSIS

The Committee was strongly influenced in our thinking on this issue by the report, testimony, and follow up responses of Justice. In order to put this issue into perspective, it would be helpful to describe Justice's report to Secretary Dole and the events that followed it. On September 11, 1984, Secretary Dole asked Justice to do an analysis of the competitive effects of the sale of Conrail to NG. On July 29, 1985, Mr. J. Paul McGrath, the Assistant Attorney General for the Antitrust Division of Justice, reported back to Secretary Dole on the results of their analysis.

In the report, McGrath described the steps followed in Justice's analysis. He said that as with any merger the first step was to identify economically relevant markets in which both NS and Conrail compete. An economically relevant market for antitrust purposes was a product and location combination which could be subject to the exercise of market power. The next step was to identify those markets in which the sale would significantly reduce competition, that is, markets in which the sale would significantly reduce rail concentration and in which competition from other existing or potential transportation alternatives, such as trucking companies, would be difficult or unlikely in response to the exercise of market power following the merger of NS and Conrail. The third step was to consider whether the anticompetitive effects indentified by Justice might be offset by efficiencies resulting from the merger. The last step was to fashion an appropriate remedy to address the anticompetitive effects.

Based on its analysis, Justice concluded that the sale to NS could be accomplished without significant adverse competitive effects only if an appropriate divestiture were made. McGrath said they were concerned primarily about the sale's effect on competition for the transportation of certain commodities to and from locations along an east-west rail corridor running between Buffalo and Pitts-

burgh in the east and St. Louis and Chicago in the west. However, he said they also believed that the divestiture of either NS or Conrail lines along the designated east-west corridor to one or more independent acquires capable of providing long term, competitive rail services would largely preserve the competition that otherwise would be eliminated by the sale. In addition, Justice believed that while there could be some possible anticompetitive effects in some isolated markets after the sale and divestiture, these anticompetitive effects would be insignificant compared to the sale's expected benefits and the overall volume of traffic involved in the sale.

In the report, McGrath also advised the Secretary that in order to ensure competitive rail service, the divestiture would have to meet three conditions, and that these conditions would have to be included in any sale agreement between NS and DOT. First, the acquirer(s) would have to demonstrate to the satisfaction of the Attorney General that it possessed the managerial, operational, and financial capability necessary to compete effectively, and to remain a viable entity providing long-term rail service along the designated corridor. Second, the divestiture would have to provide the acquirer(s) direct, independent connections in the Buffalo, Chicago, Toledo, and East St. Louis gateways to one or more railroads other than the merged NS-Conrail or CSX. Third, following the divestiture, in each of certain specified counties along the east-west corridor, the merged NS-Conrail would have to switch cars between its tracks and the tracks and facilities of any shipper served by NS, Conrail, or the merged NS-Conrail on customary terms and conditions whenever switching was practical and necessary in order to provide a shipper with effective competitive access to the track and facilities of the acquirer(s).

McGrath also said that the specific lines and facilities to be divested and the consideration to be paid should be determined by the parties to the divestiture so that the market, rather than Justice could decide the most suitable divestiture alternative. At the same time, he indicated that no sale to NS could be closed until Justice had approved the divestiture.

After receipt of the Justice report, Secretary Dole and NS agreed that prior or concurrent with NS's purchase of Conrail, NS would divest certain rail lines and facilities as mandated by Justice. This agreement is reflected in the February 8 MOI. On February 25, NS reached agreements-in-principle with Guilford and P&LE on the divestitures. In the spring, these parties reduced their agreements to definitive contracts of sale, and submitted them to Justice for approval.

During the Committee's hearings, some rail and shipper witnesses, who opposed the NS purchase, criticized DOJ's report as inadequate and inconsistent with other rail merger analysis. Contrary to these contentions, the Committee believes that, Justice analysis of the NS purchase was not only consistent with those done in other rail and nonrail mergers, but that it went far beyond anything contemplated by NERSA.

Under NERSA, the Secretary was not required to consult with any other Federal agency prior to deciding to whom to sell Conrail's common stock. In fact, section 408(c) of NERSA specifically precluded judicial or ICC scrutiny of any such sale plan. Neverthe-

less, Secretary Dole not only consulted with Justice but virtually gave them a veto power over any sale that failed to address adequately anticompetitive effects. When Justice conditioned its approval of the sale to NS on the divestiture of approximately 1,700 miles of rail lines, the Secretary agreed to make the divestiture a part of her sale plan. It is worth noting that Justice has never enjoyed such a veto power in rail merger cases before the ICC. Traditionally, the ICC performs a balancing test, and competition is only one of the factors it takes into account. In addition, the ICC has never required such an extensive divestiture.

In his testimony before the Committee, Mr. McGrath made it very clear that Justice used the same standards and principles in analyzing the NS purchase that it uses in other rail mergers. In fact, he said if anything, Justice was even more thorough in this analysis than it was in other mergers. This point was reiterated in the April 8, 1985 Justice letter (printed under the heading *Agency Comments* in this report) to the Committee, which was written to respond to criticism of Justice's analysis. Among other things, the letter refuted allegations regarding Justice's use of the so-called "50–10 test" and other screens used to identify problem markets (using the 50–10 test, DOJ identified markets, that is, product and location combinations, where Conrail and NS each participated in at least 10 percent of the rail movements and where together the two railroads accounted for at least 50 percent of all rail movements in the market); its analysis of traffic diversions; and its analysis of the impact on coal transportation.

On the question of Justice's use of the 50–10 test to measure market concentration rather than the Herfindahl-Hirschman Index (HHI) used in Justice's Merger Guidelines, Justice said it had never used the HHI in analyzing rail mergers, because it did not adequately measure the competitive consequences of such mergers.

According to Justice:

> Using the principles of market definition found in the Merger Guidelines, we often find that in railroad mergers—including this one—a relevant market includes firms that provide competitive alternatives through a variety of transportation modes, including truck and barge lines as well as other railroads. The HHI is an unsatisfactory tool to use under these conditions because the company-specific data needed for HHI analysis are generally unavailable for nonrail competitors, and it is often impossible to estimate accurately the ability of nonrail competitors already serving the market to expand their shares in response to possible increases in rail rates. Conversely, since the 50/10 test is applied only to rail data, that test generally will tend to overstate the actual concentration of all competitors in a relevant market. In rail mergers, therefore, the Department uses a series of screens other than the HHI, including the 50/10 test, that in combination generate the information necessary to identify areas of competitive concern.
>
> The Department employed the 50/10 criterion in its analyses of the Chessie/Seaboard merger and the Union Pacific/Missouri Pacific/Western Pacific merger, and we

used a similar test ("50/greater than zero") in our recent analysis of the proposed sale of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company. The Department is also using a 50/10 screen as part of its analysis of the proposed Santa Fe/Southern Pacific merger.

On the question of diversions, Justice said it had indeed analyzed them, and had concluded that no failures of railroads would result from either parallel or end-to-end diversions associated with the merger of NS and Conrail. As for the impact of the sales on coal shippers and customers, Justice explicitly considered this issue, but identified relatively few domestic markets where the merger was likely to create a competivie problem. Of the 72 utility customers interviewed by Justice few indicated they would be adversely affected, largely because they were already served by only one of the two railroads or were receiving their coal by water or truck. As for export coal, Justice concluded that Conrail was not a major carrier of such coal, and thus its merger with NS would not affect competition in this market.

During the hearings, another witness also charged that Justice arbitrarily limited its analysis to parallel competition and focused on unrealistically small markets, that is, counties. Such allegations, mischaracterize the process. As described in its January 29 report to Secretary Dole, Justice did not limit its analysis to possible adverse effects along parallel lines; it also looked at competitive consequences caused by end-to-end connections and possible reductions in source competition. In fact, the 50/10 test employed by Justice takes into account source competition by examining shipments of the two railroads from different origins to a common destination as well as shipments from a common origin to different destinations. The analysis goes far beyond the limited situation where both railroads have parallel lines serving common origins and destinations. If anything, Justice's analysis on source competition understates the positive effects of source competition that could mitigate any possible anticompetitive effects of the merger—for example, competition from shippers who are not served by either of the two merging carriers but who nevertheless compete vigorously with shippers that are served by NS and Conrail.

The criticism about county markets is also misplaced. Justice did not identify counties as markets on the basis that rail service originated and terminated in a particular country. Rather, the county definition only describes in approximate terms the area where shippers are likely to look for alternative means of transportation.

DIVESTITURES

During the hearings, some witnesses questioned whether the divestiture agreements with Guilford and P&LE would meet Justice's conditions, and suggested that the Committee postpone consideration of S. 638 until after Justice completes its review of the divestiture agreements. While no one knows for sure whether Justice will approve the divestiture agreements, the Committee does not believe that such a postponement is necessary or appropriate.

First, there are good reasons to believe that Justice will approve the divestiture agreements. This is not to suggest that Justice's

review will be anything but thorough and independent. However, it is important to note that NS, for one, has a strong incentive to negotiate agreement that Justice will approve, because without such approval it cannot purchase Conrail. Further, during the Committee's hearings, DOT, NS, and the acquiring railroads provided sound responses to questions raised about the capability of the acquiring railroads to compete against the merged NS-Conrail, their financial capability, the condition of the lines to be divested, and the consideration to be paid. These were the areas most often cited by critics who charged that the divestitures would not meet the conditions of Justice.

It may be helpful to provide some additional detail on this testimony. DOT testified that it was important to remember that the divestitures to Guilford and P&LE were not designed to allow these carriers to compete with the merged NS-Conrail over the entire breadth of its system. Justice determined that the anticompetitive effects of the merger would be largely limited to the designated east-west corridor. Accordingly, the divestitures are designed to allow Guilford and P&LE to compete in limited markets where the anticompetitive effects will occur. DOT believes the two carriers are fully capable of competing with the merged NS-Conrail in these markets.

DOT and Guilford both testified that there should be no question about Guilford's financial viability. Twenty months ago, Guilford took over three railroads, two of which were in bankruptcy, and today it is operating a profitable system. Further, the approximately 1000 miles of lines Guilford has agreed to acquire would give it excellent access to enormous markets in the midwest, and would fit comfortably with its east-west traffic base. With respect to P&LE's financial viability, DOT and the carrier agreed that it is now a marginal railroad, largely because of its limited route structure and lack of friendly connections, as well as its previous excessive equipment investments. However, they also testified that the divestiture of approximately 600 miles of lines would improve its financial status by doubling the size of its existing system, and thereby providing it with new traffic and direct access to its key markets in Ohio. Further, P&LE advised the Committee that it has been operating the railroad on a positive cash-flow basis since 1983, and that it has negotiated a voluntary reorganization plan to pay off the debt which it accumulated prior to 1983.

As for the condition of the lines to be divested, DOT, NS and the acquiring railroads all testified that with one exception the lines are in good condition. Accordingly, the cost to the acquiring railroads of rehabilitating the lines is expected to be minimal. Similarly, the consideration to be paid for the lines is reasonable, and well within the bounds of what the acquiring railroads can afford to pay. The basis for the consideration is the net liquidation value of the rail lines. P&LE will pay $18 million for its lines, and Guilford will pay $53 million.

The second reason why the Committee does not believe a postponement of S. 638 is necessary or appropriate is that the Committee adopted an amendment making it clear that there will be no sale to NS until the divestitures are approved. Knowing this, it seems to make little sense to bring the legislative process to a

standstill during the 3-to-5 month period it may take Justice to review the divestitures. Further, this right of prior approval is not only consistent with the process followed by Justice and the Federal Trade Commission (FTC) in other mergers, but in fact, is arguably more strict. By way of comparison, Justice and FTC have allowed the parties in several large mergers (for example, the Texaco/Getty, Republic/LTV, and IBM/Rolm mergers) to consummate the merger before completing the required divestitures. This will not be the case with the sale of Conrail to NS.

DIVERSIONS

During the hearings, some railroads criticized the NS purchase, because they believe the merged NS-Conrail would divert traffic from them, and thereby reduce their revenues and ability to provide competitive service. Among the railroads testifying or submitting statements to this effect were CSX, Grand Trunk, the Chicago and Northwestern (C&NW), the Illinois Central Gulf (ICG), and the Richmond, Fredericksburg, and Potomac (RF&P). Some of these railroads also asked the Committee to consider an amendment to S. 638 which would protect them against such traffic diversions.

While the Committee appreciates the concerns raised by these railroads, we are not convinced that the probable diversions would adversely affect the ability of these railroads to provide competitive service. Further, we do not believe that a legislative amendment is the proper way to handle diversion problems, especially when NS has indicated a willingness to negotiate private agreements that are designed to address the specific problems of individual railroads.

At the outset, it should be pointed out that there was considerable disagreement among the witnesses as to the amount of traffic and revenues that would be lost because of diversions. For example, CSX testified that it would lose considerable revenues, and that this would force it to abandon several thousand miles of lines or even the entire Baltimore and Ohio Railroad (B&O), and to reduce its workforce by several thousand persons. C&NW said it was concerned that almost 50 percent of its traffic which moves through the Chicago gateway could be diverted to the Kansas City Gateway. ICG said it was concerned about possible revenue losses of between $28 and $51 million.

On the other hand, DOT and NS testified that they estimated that CSX would lose approximately $43 million in revenues, which is less than 1 percent of its annual revenues of $7.9 billion. DOT also testified that they estimated that the revenue losses for the midwestern railroads, such as C&NW and ICG, would be in the range of 2 percent of annual revenues. NS submitted a schedule which reflects the results of its 1984 traffic diversion study. The schedule indicates that diversions from all railroads will be in the range of $165,000,000 to $233,000,000. However, NS also noted that these numbers should be reduced, because they were prepared prior to NS's agreement with DOT to maintain joint routings with small eastern railroads, including the Grand Trunk; NS's agreement with DOT to divest lines as mandated by Justice; NS's agreement with the Kansas City Southern Railway and offers to other

railroads to maintain joint routings; and the impact of proposed regulations before the ICC that would limit future cancellations of joint routings.

As to the effect of these diversions on the ability of the small and midsized railroads to provide effective competition, both DOT and Justice said they did not believe that there would be an adverse effect. DOT said that its diversion estimate in the range of 2 percent for individual midwestern railroads was in line with the fluctuation in revenues that a railroad might experience in a normal business year. Justice said that with respect to the small eastern railroads whose operations might have been jeopardized due to parallel diversions, the divestitures mandated by Justice would allow these railroads to operate via friendly connections through which they could serve most of their current customers. Justice also said that the midwestern railroads would not be adversely affected by end-to-end diversions, because the diversions would be small compared to the railroads' revenues. Moreover, DOT and Justice reminded the Committee that such end-to-end diversions often are good for the economy, because they reflect the choice of shippers to move their goods via low-cost, efficient single-line routes, which in this instance would be created by the merged NS-Conrail.

Both DOT and Justice testified that they did not believe that CSX would be adversely affected by diversions, because again the probable diversions would be small compared to its revenues. As to CSX's threat that it would abandon rail service and thereby lay off employees, DOT testified that it believed that this was highly improbable. In testimony and follow up letters to Senators Gore and Ford (printed under the heading *Agency Comments* in this report), DOT pointed out that CSX would have to file an abandonment petition with ICC, and prove that the now profitable rail lines were no longer making money. Further, if ICC approved the abandonment, shippers or others would have the opportunity to subsidize continued service on the lines, or to purchase them at net liquidation value. Gilford and NS already have indicated that they would be interested in purchasing the lines, if they were put up for sale. Finally, if the abandonment were granted, ICC by law would impose standard labor protection conditions against CSX for the employees adversely affected by the abandonment. Under the law, these employees would be entitled to up to 6-year's full salary, which in the case of the B&O's 12,000 employees would amount to $2–3 billion. This prospect alone would discourage CSX from seeking the abandonment.

During the markup of S. 638, Senator Pressler offered an amendment to protect small and midsized railroads like C&NW, ICG, and the RF&P against traffic diversions by the merged NS-Conrail. While many of the Committee members expressed an interest in seeing the concerns of these railroads resolved, the amendment was viewed as going too far and as virtually repealing provisions of the Staggers Rail Act of 1980. Among other things, it would have required NS to allocate traffic to these railroads and to equalize its single-line and joint-line rates regardless of the market situation or competitive forces involved. It would have required NS to set rates collectively with other railroads instead of independently as provided for by current law. The effect of the amendment would have

been higher rates for shippers and the elimination of NS's opportunities to realize efficiencies that otherwise could be realized through the merger with Conrail. Furthermore, the amendment would have run counter to the Staggers Rail Act of 1980, which promotes more rate flexibility. Secretary Dole, Justice, NS, and shippers represented by the National Industrial Transportation League (NITL), and the Committee Against Revising Staggers all wrote to the Committee to express their opposition. The Committee defeated the amendment by a vote of 14 nays and 3 yeas.

The Committe believes that the best way to resolve the particular concerns of the railroads and to avoid going too far with legislation is through privately negotiated agreements. As part of its sale agreement with DOT, NS agreed to reestablish joint routings with a number of small eastern railroads, including Grand Trunk, which were closed by Conrail. Further, NS and the Kansas City Southern have signed an agreement pursuant to which NS has agreed to maintain existing joint routings. NS also has offered similar agreements to the C&NW, ICG, RF&P, and the Iowa Interstate Railroad. It has been in contact with the Soo Line-Milwaukee Railroad, as well. The Committee urges NS and the other railroads to reach reasonable agreements as soon as they can.

As a final note, The Committee should point out that ICC currently is considering proposed regulations that would make it more difficult for railroads to cancel joint routings. The proposed regulations are based on agreements between the Association of American Railroads, NITL, and the Chemical Manufacturers Association. NITL has advised the Committee that if these regulations are adopted, they would help protect the small and mid-sized railroads against possible routing cancellations by the merged NS-Conrail. NS had endorsed the proposed regulations.

TAX ISSUES

There has been a great deal of discussion about the tax effects of NS's purchase of Conrail, and much of this discussion, unfortunately, has served to confuse rather than illuminate the issues presented. While this Committee does not have jurisdiction over tax legislation, it is appropriate, in light of the considerable interest in these issues, to offer some clarification in this report.

The first and most essential point is that existing Federal tax law applicable to a stock sale would apply in this case; there is no special tax treatment being provided to NS in either the MOI signed by DOT and NS or in S. 638. However, there is one variation from normal tax treatment that works against NS; NS is required to give up the net operating loss and investment tax credit carryovers that would normally be available to a purchaser.

During the hearings, the Department of the Treasury testified that the tax treatment of the NS purchase of Conrail is in accordance with existing tax law and follows what would occur in a normal stock sale; no more, no less. (A letter from the Department of the Treasury on the tax impact is printed under the heading *Agency Comments* in this report.)

For example, as in any case of a change in ownership of corporate stock, the tax basis of Conrail assets will continue to be avail-

able to NS as the purchaser of the stock. The allowance of tax depreciation on those assets following a purchase by NS is nothing more than what existing tax law would provide to any purchaser, including purchasers in a public offering.

It appears that the critics of the tax aspects of this proposal are really finding fault with the normal operation of the Federal tax laws, particularly the rules on depreciation, rather than with any unique feature of this proposal.

Given this basic premise of normal tax treatment, the question then becomes whether there are characteristics of any particular purchaser that would cause certain tax benefits to be available to that purchaser and not to other potential purchasers. Here again, however, if benefits are available, it is because of the operation of existing law. One issue that has been raised in the case of a NS purchase is that Conrail would be a corporate member of the NS consolidated group for tax purposes, which means that there is the potential, if deductions available to Conrail exceed its income, for the "unused" deductions to be used to offset consolidated group income. However, if Conrail has sufficient income to utilize this depreciation, there is no tax benefit available here that would not also be available to all other purchasers. In any event, suggestions that NS will receive several hundred million dollars of benefits appear to be greatly exaggerated.

If a relatively small tax impact could potentially exist with a proposed sale to NS, the next question is whether other options, such as a public stock offering, might also result in tax benefits particular to only those transactions. The answer is clearly yes, and again whatever benefits might exist simply result from the application of existing law. For example, if proposed purchasers in a public offering are tax exempt organizations, all dividends paid to those organizations would be tax free. In addition, Conrail, while under Government ownership, has earned significant amounts of money by transferring tax benefits to other parties, which represents millions of dollars in tax loss to the Government. A stand alone Conrail would certainly engage in the same transfer of tax benefits through leasing transactions. In short, any other option for selling Conrail, such as a public offering, could have certain unique characteristics which could have a revenue loss or tax expenditure impact, and this impact could easily be equal to or in excess of any tax impact of the consolidated return rules under a NS purchase.

In short, the tax debate is a greatly overplayed issue. Any sale option could have certain particular tax impacts under existing law, but the differences between transactions are insignificant and raise no real public policy issues. Congress should assure that the Federal tax laws apply to the purchaser of Conrail, and that no special treatment is afforded. That is the basic policy embodied in the MOI and S. 638.

Estimated Costs

In accordance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate and section 403 of the Congressional Budget Act of 1974, the Committee provides the following cost estimate, prepared by the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, June 6, 1985.

Hon. JOHN C. DANFORTH,
Chairman, Committee on Commerce, Science and Transportation, U.S. Senate, Dirksen Senate Office Building, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed S. 638, the Conrail Sale Amendments of 1985, as ordered reported by the Senate Committee on Commerce, Science and Transportation, April 30, 1985. The bill provides for the transfer of Conrail to the private sector and cancellation of the federal government's interest in Conrail debt and preferred stock, as detailed in the Memorandum of Intent between the United States and Norfolk Southern Corporation. This letter provides an estimate of the budget impacts of S. 638 through fiscal year 1990, as required by Section 403 of the Congressional Budget Act of 1974.

If this bill is enacted, we estimate that the federal government would be paid about $1.4 billion in 1986 for the sale of Conrail, would save about $10 million a year in labor protection payments, and would lose about $0.4 billion in tax revenues and $0.8 billion in future interest and dividend payments from Conrail over the 1986–1990 period. There are, however, a number of uncertainties surrounding this estimate and they are discussed in detail below. Also, this estimate does not adjust future year budget effects to account for the time value of money. Moreover, this estimate does not represent an economic analysis of the proposed sale, which would extend farther into the future and would encompass a number of other factors, including whether or not the government should be in the railroad business. CBO is currently preparing such an analysis, and we will be pleased to share it with you when it is completed later this year.

BUDGET IMPACT

CBO, in conjunction with the Joint Committee on Taxation (JCT), has estimated the budgetary impact of S. 638 compared to the situation if no legislation is enacted. In the latter case, we have assumed that the United States continues to hold its interest in the common stock of Conrail, labor protection payments continue to be made by the federal government, Conrail does not pay state or federal taxes, and interest on debentures and dividends on preferred stock are paid to the federal government, according to the 1979 financing agreement between Conrail and the United States Railway Association (USRA).

Compared to this base case, the legislation would affect the budget in four ways:

(1) the government would receive payments from Norfolk Southern for the purchase of the Conrail common stock now held by the government;

(2) the government would save future labor protection costs, which would be borne by Norfolk Southern and other railroads acquiring divested properties;

(3) the government would lose future interest on debentures and dividends on preferred stock, which it would be entitled to receive from Conrail under the 1979 financing agreement;

(4) the government would lose tax revenues because of Norfolk Southern's acquisition of Conrail.

We will discuss each of these effects separately in the remainder of this letter.

Purchase Price.—Under the terms of the Memorandum of Intent, the Norfolk Southern Corporation agrees to pay the federal government, on the closing date, a cash purchase price of $1.2 billion plus any cash and temporary investments held by Conrail that exceed $800 million. For the purposes of this estimate, CBO has assumed a closing date of Janaury 1, 1986. At the end of December 1985, we estimate that Conrail will have cash on hand of approximately $1 billion and that the Norfolk Souther Corporation would make a one-time total cash payment to the federal government of about $1.4 billion in fiscal year 1986.

Labor Protection Payments.—The bill would eliminate labor protection payments currently made by the federal government, except to those individuals who are eligible prior to the sale. Labor protection payments to employees laid off after the sale would be covered by the Norfolk Southern Corporation and other railroads acquiring divested properties. The outlay savings to the government from eliminating the federal labor protection payments would be approximately $2 million in 1986, and $10 million annually from 1987 through 1990.

Interest and Dividend Loss.—The bill would also cancel Conrail's debt and preferred stock now held by federal government. The federal government, through the USRA, currently owns $851 million of debentures, $2.3 billion of Conrail Series A, and $32 million of Series B preferred stock. Contrail is required to pay interest, dividends, and principal to the government under terms specified in the Amended and Restated Financing agreement between SRA and Conrail of 1979. Generally, under this agreement, Conrail is required to make payments once its cumulative net income exceeds $500 million; the amount of the annual payments then is either the amount of cumulative net income (excluding payments) over $500 million or one-half of the previous year's net income, whichever is lower. We estimate that if the United States were to retain ownership of Conrail, Conrail, payments to the federal government would begin in 1988. These payments would be slightly less than $0.3 billion in each year, totaling approximately $0.8 billion from 1988 through 1990. (Such payments would continue after 1990, assuming that Conrail would remain profitable, but the amounts paid might differ.) If S. 638 is enacted, the government would not receive these payments. Offsetting receipts would thus be $0.8 billion lower and net outlays correspondingly higher over the 1988–1990 period. (This same result would occur from any sale of Conrail that involves cancellation of Conrail's debt to the federal government.)

Tax Revenues.—The Joint Committee on Taxation estimates revenue losses to the federal government of approximately $0.1 billion annually from 1987 through 1990, as a result of a sale to Norfolk Southern. (The JCT has indicated that as more information becomes available, revisions may be necessary.) CBO has reviewed

and concurs with these revenue estimates. These revenue losses would arise primarily because of Norfolk Southern's ability to use Conrail's depreciation deductions to offset taxable income generated by other portions of the merged corporation. A portion of the revenue losses would also result from the deductibility of Norfolk Southern's proposed payment to Conrail employees for outstanding wage claims. These losses are partially offset by a revenue increase resulting from Conrail's likely shift from leasing to purchasing equipment, if sold to Norfolk Southern. The details of the revenue estimate are discussed below.

KEY ASSUMPTIONS

The budgetary impact of the sale is based on several key assumptions:

(1) New Income Projections—estimates of Conrail's net income critically affect both the estimate of payments of interest and dividends to the government and the estimate of tax losses;

(2) Revenue Estimating Issues—a series of legal and economic assumptions concerning the tax effects of the sale strongly influence the revenue estimate.

These assumptions are discussed in more detail below.

Net Income

CBO's estimate of Conrail's net income in the absence of a sale is based on an analysis provided by USRA on April 1, 1985. That report essentially adjusted projections prepared by Conrail. CBO then made both technical and economic adjustments to the USRA estimates. Two technical adjustments to operating income were necessary. First, USRA assumed that Conrail would make all labor protection payments after 1984; we assume that in the absence of a sale, the federal government would continue to make labor protection payments and Conrail would not bear such costs. Second, USRA assumed that Conrail would begin to pay state taxes in 1985; we assumed that, in the absence of a sale, Contrail would continue to pay no state taxes. These adjustments increase Conrail's net operating income by $40 million annually.

In addition to these technical changes, CBO adjusted USRA's projections for operating income to make them consistent with the macroeconomic assumptions in the Senate-passed 1986 budget resolution. USRA's scenario forecasts a recession for 1986 and 1987, with a 42 percent decrease in net income between 1985 and 1986. The economic assumptions underlying the 1986 budget resolution do not include an explicit recession assumption. In order to adjust operating income to reflect this difference, CBO started with USRA's 1985 net operating income (including technical adjustments) and increased 1986 and 1987 income to reach the adjusted USRA 1988 level. After 1988, the last year in which USRA forecast net income, CBO assumed a 5 percent annual increase in net operating income, approximately the same as used for the previous years.

CBO also adjusted USRA's estimate of non-operating income. USRA assumed no interest income on Conrail's cash over $500 mil-

lion. CBO estimated that interest income would be earned on all of Conrail's cash on hand, and would be earned at interest rates consistent with those used in the Senate-passed budget resolution. Under these assumptions, Conrail's projected net income would be about $500 million in 1986, rising gradually to about $600 million in 1990.

While estimated net income significantly affects both payments to the government and revenue losses, these effects are partially offsetting. For example, if USRA's recession assumptions were adopted, resulting in lower Conrail net income, the total payments forgone by the government if Conrail is sold would decrease from $0.8 billion to $0.7 billion over the 1986–1990 period. Tax losses from the sale, however, would increase from $0.4 billion to $0.5 billion over the same period.

Revenue Estimating Issues

Estimating the revenue effects of the legislation raises a number of issues that have not been completely resolved. The potential availability of Conrail's approximately $3 billion in future depreciation deductions to offset future Norfolk Southern taxable income is of greatest significance to the estimates. A second issue with large revenue implications is the treatment of Norfolk Southern's proposed $375 million financial settlement with Conrail labor. The third issue is the extent to which aggregate leasing in the economy will change as a result of the sale. Certain assumptions regarding these issues, described below, were required for estimating purposes. A more complete discussion of the revenue issues surrounding the proposed sale can be found in "Description of Revenue Provisions of H.R. 1930 and Background Relating to Proposed Transfer to Norfolk Southern Corporation," a JCT print.

Conrail's depreciation deductions can be used to offset Norfolk Southern's income if the fair market value of the assets being depreciated is at least equal to 85 percent of their value for tax purposes. Were it instead determined that the fair market value was less than 85 percent of the value of the assets for tax purposes, Norfolk Southern's ability to offset non-Conrail income could be limited through the so-called "built-in loss limitation" provisions of the tax code. To our knowledge and appraisal of fair market value does not exist. Additionally, it is not clear how such an appraisal should be prepared. Fair market value determined on an asset-by-asset basis might differ from the value of the railroad as a going concern, subject to various contractual, regulatory, and legal constraints.

The Department of the Treasury has indicated that the difference between the proposed purchase price and the value of the assets for tax purposes suggests that the built-in loss limitation would apply; it has not concluded this with certainty. On the other hand, Norfolk Southern claims that it will be able to use the full depreciation deductions and has presented some materials to substantiate its claim. While this matter would probably be settled in the audit and judicial process, an assumption is necessary in order to construct revenue estimates. In the absence of any direct evidence that the fair market value of Conrail's assets is some identifiable amount less than 85 percent of their tax value, the JCT as-

sumed that Norfolk Southern would not be limited in its use of Conrail's depreciation deductions. If it were instead assumed, for illustrative purposes, that the fair market value of the assets was equal to only 75 percent of their value for tax purposes, the revenue loss from the sale would be reduced by $0.2 billion over the 1986–1990 period (assuming that Norfolk Southern would lease equipment to allow more rapid access to built-in losses).

A second major set of assumptions concerns Norfolk Southern's agreement to pay $375 million to Conrail employees and beneficiaries of Conrail's Employee Stock Ownership Plan (ESOP). This payment will be made, under terms that are not yet final, in exchange for the ESOP's stock interest in Conrail as well as for the settlement of outstanding wage claims. The ESOP portion of this agreement, however, cannot be implemented without further legislation. Both the termination of the ESOP plan and any distributions from the plan to beneficiaries before 1991 are prohibited by current law, and S. 638 contains no provisions allowing such changes. For this reason, the JCT has estimated no revenue effect from the ESOP portion of the $375 million.

Two issues must be resolved to estimate the revenue effect of the wage claim portion of the labor settlement: what portion of the $375 million is attributable to the wage settlement and whether the payment is deductible by Norfolk Southern. The JCT attributed $212 million of the $375 million settlement to the ESOP, assuming that it would receive the same price as the government for its interest in Conrail—$48 per share. The JCT further assumed that the resulting value of the wage settlement (163 million) would be fully deductible when paid by Conrail as a subsidiary of Norfolk Southern. Ordinarily, such a payment would be deductible; in the context of this transaction, however, the payment, particularly if made directly by Norfolk Southern, could be construed as part of the purchase price, and hence not deductible. It is reasonable to assume, nevertheless, that Conrail would take the position of its tax return that the wage payment is deductible (whether paid out of Conrail's existing funds or after a constructive contribution of funds by Norfolk Southern.)

The net revenue loss from the wage settlement is the difference between the revenues lost by deductibililty and those gained by taxing the employees receiving the payments. This cost estimate treats the settlement of $163 million in this fashion. If, instead, the entire $375 million were allocated to the wage payment portion of the settlement, the revenue loss would increase by $0.1 billion over the 1986–1990 period.

Conrail has traditionally financed most of its equipment through leveraged lease transactions—transferring some of the tax benefits associated with ownership to lessors—and is likely to continue to do so if no sale occurs. Conrail, as a Norfolk Southern subsidiary, is likely to purchase and depreciate future capital additions. If Conrail's current lessors find other lessees to replace business attributable to Conrail, no additional tax revenue is raised by Conrail not leasing. If on the other hand, the total amount of equipment leasing drops and lessors increase investments in currently taxable obligations, there would be a revenue increase. In preparing this estimate, the JCT assumed that the volume of leasing would be re-

duced and thus revenues increased. If, instead, total equipment leasing in the economy were assumed to remain constant, effectively increasing claimable depreciation deductions, the total revenue loss would be $0.2 billion higher over the 1986–1990 period.

Estimated Cost to State and Local Governments.—This bill could increase revenues to state governments by an estimated $25–30 million annually. More than 50 percent of the revenues would be collected by Pennsylvania, New York, Ohio, and New Jersey. In 1981, Conrail was exempted by law from paying state taxes until a sale occurred. In January 1985, however, the corporation voluntarily offered to begin paying taxes to the states, with the condition that they make no attempts in the future to recoup revenues forgone from 1981 through 1984. No state has accepted this offer to date, but Conrail is holding funds in escrow to pay 1985 taxes. Since Conrail is not currently paying these taxes and is not required to pay them in the absence of a sale, our base case analysis assumes that no payments would be made.

If you wish further details on this estimate, we will be pleased to provide them.

With best wishes,

Sincerely,

RUDOLPH G. PENNER, *Director.*

REGULATORY IMPACT STATEMENT

In accordance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee provides the following evaluation of the regulatory impact of the legislation:

NUMBER OF PERSONS SUBJECT TO ADDITIONAL REGULATION

The basic purpose of this bill is to return Conrail to the private sector through the sale of the Federal Government's stock interest in Conrail to NS. The implementation of the sale plan will require the Secretary and NS to negotiate and perform definitive agreements based on the MOI they signed on February 8, 1985. It also will require the Attorney General to approve the divestiture of rail lines and facilities by NS to one or more transferees. Further, for a period of 5 years NS will be required to comply with a series of financial and service covenants, which are enforceable by the Secretary. However, over the long run, the bill will decrease the amount of Federal regulation for both NS and Conrail. In addition, it will relieve the Secretary and USRA of their responsibilities for Conrail.

ECONOMIC IMPACT OF SUCH REGULATION

The economic impact of the implementation of the sale plan is not significant. The cost to NS of complying with the financial and service covenants is significant; however, this cost was factored into the sale price for Conrail.

PRIVACY

The bill will have no effect on the personal privacy of any individuals.

ADDITIONAL PAPERWORK AS A RESULT OF SUCH REGULATOIN

For a period of 5 years, NS and Conrail will be required to submit certificates to the Secretary on a quarterly basis certifying that they are in compliance with the financial and service covenants contained in the Definitive Agreements. In turn, the Secretary is required to submit annual reports to the Senate Committee on Commerce, Science, and Transportation and the House Energy And Commerce Committee setting forth the compliance certificates.

While these requirements will result in some additional paperwork for NS, Conrail, and the Secretary, the Committee believes that it is insignificant, in view of the importance of providing a mechanism whereby Congress can be assured of compliance with the covenants.

SECTION-BY-SECTION ANALYSIS

SECTION 1.—SHORT TITLE

This section states that the legislation may be cited as the "Conrail Sale Amendments Act of 1985".

SECTION 2.—FINDINGS

This section sets forth eight findings, which are that:

(1) NERSA provided for an orderly return of Conrail to the private sector;

(2) NERSA was successful in preparing Conrail for return to the private sector;

(3) USRA found Conrail met the standards of profitability necessary for it to be returned to the private sector;

(4) the Secretary engaged an investment banker and arranged, through open competitive bidding and negotiation, to sell Conrail;

(5) the Secretary's Plan provides for the sale of Conrail to NS;

(6) the sale to NS best meets the sale criteria of leaving Conrail in the strongest financial position after the sale, preserving patterns of service to the shippers and communities Conrail serves, and maximizing the return to the Federal Government;

(7) amendments to existing laws are needed to permit the sale of Conrail to NS and to permit the cancellation of the Federal Government's interest in Conrail's debt and preferred stock; and

(8) the Secretary's Plan satisfies the requirements of NERSA, including the requirement that the Secretary offer stock to those employees who agreed to wage reductions in accordance with NERSA.

SECTION 3.—PURPOSE

This section states that it is the purpose of the legislation to return Conrail to the private sector by directing and facilitating the implementation of the Secretary's Plan to sell Conrail to NS.

SECTION 4.—DEFINITIONS

This section defines key terms used in the legislation, including the "Secretary's Plan" and the "definitive agreements".

"Secretary's Plan" is defined to mean:

(1) the February 8, 1985 MOI between the Secretary and NS, which contains the terms and conditions of their agreement on the Conrail sale; and

(2) the divestitures by NS of certain rail tracks and facilities and any transactions or agreements related or incidental to such divestitures, in connection with the implementation of Justice's January 29, 1985 letter to Secretary Dole, which conditioned Justice's approval on such divestitures.

During the executive session, the Committee agreed to a minor change in S. 638's original definition of Secretary's Plan in order to make clear that it included both NS's divestiture of rail lines and facilities, and the transactions required of the acquiring railroads to implement the divestitures. The Committee did this basically by adding the language referring to "any transactions or agreements related or incidental to such divestitures".

"Definitive agreements" is defined to mean any and all agreements existing or to be developed between the Secretary and NS to implement the MOI.

Title I—Amendments to the 3-R Act and NERSA

Subtitle A—3-R Act Amendments

SECTION 101.—LIMIT ON AUTHORITY TO PURCHASE STOCK

This section amends section 216(b) of the 3-R Act to provide that the authority of USRA to purchase debentures or preferred stock of Conrail shall terminate upon the consummation of the sale of the Federal Government's interest in Conrail under the terms of the Secretary's Plan.

SECTION 102.—RESPONSIBILITY OF CONRAIL DIRECTORS

This section amends section 301(i) of the 3-R Act to provide that the members of Conrail's Board of Directors shall continue to be immune against civil liability for actions required by law taken to implement the Secretary's Plan.

SECTION 103.—APPLICABILITY OF 3-R ACT TO CONRAIL AFTER SALE

This section amends section 301 of the 3-R Act by adding a new subsection that states that with certain exceptions the provisions of the 3-R Act shall not apply to Conrail or to its Board of Directors after the consummation of the sale of the Federal Government's interest in Conrail under the terms of this legislation. The provisions of the 3-R Act that would continue to apply are enumerated in the new subsection. Under these provisions:

(1) the definitions are retained;

(2) the Conrail seat on the USRA Board of Directors is continued in order to facilitate cooperation between USRA and

Conrail regarding information needed to resolve, after the consummation of the sale, matters which arise before the sale;

(3) the requirement that Conrail make information available to USRA is retained, but only with respect to information related to proceedings pending before the Special Court;

(4) the immunity against civil liability for trustees and other persons with responsibility for the Conrail ESOP is continued, but only with respect to activities that take place prior to or in connection with the sale;

(5) the ESOP qualification for tax purposes is continued and transfer is facilitated, that is, NS is permitted to buy out the ESOP with cash or its NS stock;

(6) the right to collect on the debts accumulated by commuter authorities for Conrail's operation of commuter service prior to January 1, 1983 is retained;

(7) The immunity against civil liability for members of Conrail's Board of Directors for actions taken prior to or in connection with the implementation of the sale is retained;

(8) The New England Supplemental Transactions, rights and obligations already adjudicated and specified in the order of the Special Court are preserved within the jurisdiction of the Special Court;

(9) Conrail's right to abandon lines on an expeditious basis is retained, but only in those cases where Conrail has filed for the abandonment prior to the consummation of the sale; after the sale, Conrail will be bound by regular ICC abandonment procedures;

(10) the authority to sell the common stock of Conrail is maintained with added direction to implement the Secretary's Plan and coordinated operation of the combined NS and Conrail systems;

(11) the Secretary; right to recapitalize Conrail is preserved and Conrail's Series A preferred stock and debentures issued by USRA are cancelled;

(12) the Special Court continues to be the only entity authorized to review various aspects of the sale, including enforcement of the terms and conditions which are part of the Secretary's Plan, the definitive agreements and the enabling legislation; limited exceptions to this exclusive right of review are provided for in section 106 of this legislation;

(13) existing agreements or benefit schedules governing labor protection are continued, but only to the extent necessary to identify employees eligible for benefits under such agreements or benefit schedules; after the consummation of the sale, NS and the railroads acquiring divested lines and facilities will be responsible for labor protection for employees adversely affected by the sale as provided for in section 108 of this legislation;

(14) the employee positions "blanked" or abolished by Conrail will continue to be blanked;

(15) the job register maintained by the Railraod Retirement Board for terminated employees continues to be available for Conrail employees whose jobs are terminated in the future;

(16) Federal Employers Liability Act claims arising from injuries incurred by employees of predecessor railroads prior to

the beginning of Conrail operations on April 1, 1976 continue to be Conrail's responsibility;

(17) labor protection provided to employees terminated prior to consummation of the sale continues to be the responsibility of the Federal Government;

(18) the exemption from State full crew laws is continued for Conrail after consummation of the sale, as well as for other railroads in the Conrail region;

(19) the authority to submit certain disputes and controversies to final and binding arbitration is continued, but only with regard to those disputes and controversies that arose prior to the consummation of the sale; and

(20) labor protection for employees adversely affected by the sale will be as provided for in section 108 of this legislation.

Two provisions of law that are not specifically enumerated in the new subsection are section 217(c) of the 3-R and section 1136 of NERSA (45 U.S.C. 744a). It is not necessary to include section 217(c), because that section makes clear that Conrail will be liable for State taxes accruing after the sale and will be exempt for such taxes accuring before the sale. Because section 1136 of NERSA, concerning the transfer of commuter service, is not part of the 3-R Act, it remains in effect even though not among the enumerated provisions.

SECTION 104.—IMPLEMENTATION OF THE SECRETARY'S PLAN

This section amends section 401 of the 3-R Act, which is the section added by NERSA that authorizes the Secretary to arrange for the sale of Conrail as an entity. Specifically, it amends subsection (a) of that section by repealing the existing paragraph that provides for the veto by Congress of the Secretary's sale plan, and substituting a paragraph authorizing and directing the Secretary to implement the Secretary's Plan to sell Conrail to NS; adding a paragraph directing the Secretary to implement the Secretary's Plan by negotiating, executing, delivering, and performing the Definitive Agreements which shall conform to the February 8, 1985 MOI between Secretary Dole and NS, and requiring notification to the Congress of any alterations from the MOI prior to sale and any waiver of a substantive covenant, agreement, or obligation contained in the definitive agreements after the sale; adding a paragraph that provides that the Secretary shall not transfer the Federal Government's interest in Conrail except concurrently with a divestiture by NS of rail assets and rights approved by the Attorney General; and adding a paragraph stating that the sale shall be deemed to be consummated at the date title to the common stock passes to NS and the United States receives the cash purchase price.

After the passage of NERSA, the United States Supreme Court ruled in *Immigration and Naturalization Service* v. *Chadha et al.* 103 S.Ct. 2764 (1983) that the legislative veto was unconstitutional. The effect of this decision was to invalidate the paragraph in section 401(a) that provided that the sale plan should be deemed approved and the Secretary should implement the plan, unless vetoed by Congress. Accordingly, this section of the bill repeals the veto

language, and substitutes a paragraph specifically authorizing and directing the Secretary to implement the Secretary's Plan to sell Conrail to NS.

The new paragraph directing the implementation of the Secretary's Plan also provides that such implementation and the coordinated operation of Conrail's properties with those of NS's other rail affiliates is deemed approved by the ICC under the merger provisions of title 49, United States Code. This language is necessary in order to provide the same antitrust immunity to the NS-Conrail merger as all other railroad mergers receive when they are approved by the ICC. Such immunity is appropriate in view of the review and approval of the sale by the Congress and Justice and DOT. Further, without such immunity, the opponents of the sale could hold it up in court for a prolonged period of time,

While the Committee believes that antitrust immunity is necessary and appropriate for the sale, we do not intend such immunity to be conferred to transactions that are not specifically identified or clearly anticipated by the Secretary's Plan or the legislation approving the sale. For example, any future joint rate cancellations, gateway closings, or abandonments by Conrail and the other NS affiliates would be fully subject to the limitations of title 49, United States Code, and the antitrust laws. Similarly, the agreement between NS and the Kansas City Southern to maintain existing joint rates and other comparable agreements that NS is expected to negotiate would be subject to title 49, United States Code, and the antitrust laws.

This section added a paragraph requiring the Secretary to negotiate and perform definitive agreements to implement the MOI. During the executive session, a question was raised about why the covenants contained in the MOI were not incorporated in S. 638. The concern that prompted this question is that the covenants could be modified or just evaporate when the definitive agreements are negotiated and performed. In view of this question, the Committee emphasizes that while we are not incorporating the covenants or other parts of the MOI in the bill, we clearly expect the definitive agreements to reflect all of the terms and conditions contained in the MOI, including the covenants. At the same time, we appreciate the concern raised about possible modifications or the waiver of terms and conditions. In fact, the Committee notes that the MOI contains a section that provides that the definitive agreements shall permit the Secretary to waive NS compliance with its terms and conditions under certain circumstances. While it is understood that this waiver provision is intended to cover unforeseen and nonsubstantive matters, such as the need to waive strict compliance with a filing date, we think there is some possibility that it could be interpreted too broadly. Accordingly, to address the concern about possible modifications or waivers of terms and conditions, the Committee agreed to two amendments to this section of the bill. The first amendment tightens the directive to the Secretary to negotiate and perform the definitive agreements, which conform with the MOI, by striking language that said the definitive agreements should "in the Secretary's judgment conform substantially" to the MOI. The second amendment adds two provisions. The first directs the Secretary to give Congress 45 days

notice prior to the consummation of the sale if the definitive agreements will include any alterations from the MOI. The second requires that, after the sale, the Secretary give Congress 45-days notice prior to the waiver of any substantive covenant, agreement, or obligation contained in the definitive agreements.

The Committee also agreed to an amendment to this section which addresses the concern raised by some about whether the Secretary and NS could consummate the sale prior to the Attorney General's approval of the divestitures required by Justice in its January 29, 1985 letter to Secretary Dole. While the MOI states that prior to closing, NS shall divest rail tracks and facilities as required by the January 29 letter, the Committee decided to make this requirement absolutely clear by adding a paragraph that provides that the Secretary shall not transfer the Federal Government's interest in Conrail except concurrently with a divestiture by NS approved by the Attorney General.

SECTION 105—RAILROAD PURCHASERS AND OFFER FOR SALE OF SHARES TO EMPLOYEES

This section repeals subsections (d) and (e) of section 401 of the 3–R Act. Subsection (d) sets limitations on voting of stock by railroad purchasers if Conrail were sold as a terminal company owned by several railroads. Subsection (e) gives the employees right of first refusal on stock in amounts equal to the wage reductions they agreed to under NERSA. The first provision is unnecessary, because under S. 638, NS is purchasing all of the stock. The second provision is unnecessary, because the Secretary considered, but did not accept, the employees' offer to purchase Conrail. In addition, NS has agreed to pay the employees $375 million in cash or NS stock for the employees' 15 percent stock interest in Conrail and for their past wage concessions.

SECTION 106.—CANCELLATION OF DEBT AND PREFERRED STOCK

This section amends section 402 of the 3–R Act to provide for the recapitalization of Conrail so that the debt and preferred stock now held by the Federal Government are cancelled. The Federal Government, through USRA, owns $851 million of debentures, $2.3 billion of Conrail Series A, and $32 million of Series B Preferred Stock.

Section 402 currently provides for such recapitalization and cancellation; however, the Federal Government maintains a contingent interest which would attach to the debt or preferred stock in the event of a future bankruptcy, substantial sale, or liquidation of Conrail's assets. This provision was added by NERSA, because Congress determined that no prospective purchaser of Conrail's common stock would buy such stock subject to the debt and preferred stock. In addition, Congress did not expect the debt and preferred stock to be repaid with or without a sale. At the same time, Congress wanted to discourage any purchaser from buying Conrail with the idea of extracting its cash and other assets, selling it, or liquidating it. Accordingly, Congress provided for the contingent liability. However, the Committee now is persuaded that such a contingent liability is impracticable, and that Conrail cannot be sold

with it. Further, it is clear from the Committee's hearings that NS intends to operate Conrail over the long haul, and that Conrail is unlikely to go bankrupt if operated in combination with NS.

This section also amends section 402 to permit NS to bring a civil suit for any breach of the representations regarding NS's Federal tax liability, which are contained in paragraph 6(e) of the MOI. The representations shall be considered breached if the Internal Revenue Service (IRS) issues a statutory notice of deficiency, assesses income tax, or files a claim in court against NS. Any judgment for money damages in favor of NS shall be limited to an offset against NS's Federal tax liability.

This section provides a mechanism for enforcement of the tax representations. Such a legislative provision is necessary, because DOT did not want to follow the procedures normally used in private sales transactions to back up warranties, which is to escrow funds, provide a bank letter of credit, or guarantee immediate reimbursement for assets not there. In addition, DOT did not want to create special rules that would restrict the IRS in auditing or assessing tax liabilities against NS or Conrail after the sale.

The representations contained in the MOI are similar, albeit it more narrow, to the warranties that any seller would give to a buyer in a private sales transaction. Specifically DOT represented what the assets were and at figures shown on Conrail's tax return. Further, DOT represented that if after closing, the IRS requires reductions in asset basis in preclosing years, then, to the extent those reductions increase the net operating loss (NOL), the NOL's are to be carried forward (apart from this, all unused NOL's existing as of the date of closing are to surrendered). Further, if such a reduction in asset basis does not increase the NOL's, the basis of assets as shown on Conrail's corporation income tax return is warranted. Moreover, no gain or loss of income is to be recognized by Conrail or NS, and no reduction made in the basis of assets of Conrail upon the sale of Conrail shares and the resulting change of control of Conrail, unless NS makes, or is deemed to have made, an election under section 338 of the Internal Revenue Code. Section 338 generally permits a buyer of stock to record the purchased corporation's assets at the price paid for the stock. There is also a proviso that, if there would otherwise be a deemed election, the buyer may instead elect a carryover basis for the transferred asset. This warranty was provided because, as of the date the MOI was signed, the Treasury Regulations providing for a carryover basis to avoid a deemed election under section 338 had not been issued. Those Regulations have since been issued providing for this same result.

There is an additional representation providing that DOT's cancellation and contribution to capital of Conrail's debt and preferred stock shall not result in the recognition of income and that no basis reduction will be required under sections 108 or 1017 of the Internal Revenue Code. The general rule is that contributions to capital by a stockholder do not result in income to the transferee. However, DOT agreed to make this representation to address a possible problem based on the timing of the transaction. Because the contributions would be effective on the closing date, it is possible that an argument could be made that the contributions were effective a fraction after closing or that the existence of the requirement made

NS the contributor—in either of which cases there might be income which would fall in a post closing year. Since neither of these cases is intended, DOT represented to NS that no Federal tax liability would occur.

SECTION 107.—APPLICABILITY OF OTHER LAWS

This section repeals subsection (b) of section 408 of the 3–R Act, which provided that upon the sale of Conrail's stock or its assets, the entity acquiring the stock or assets would be deemed a railroad and Conrail would be relieved of its responsibility to provide rail service. This subsection is not required, because under the NS sale plan Conrail would continue to be responsible for providing rail service.

This section also amends subsection (c) of section 408, which currently provides that no sale of Conrail's stock or assets shall be subject to judicial review or to review by the ICC. The changes made in this section are intended to provide specific reference to the sale to NS and to emphasize anew that Congress intends the special court to have exclusive jurisdiction to review the negotiation, execution, and implementation of the Secretary's Plan and the definitive agreements. Neither the sale nor any aspect related to the sale shall be subject to administrative review or review by the ICC.

SECTION 108.—LABOR PROTECTION

This section amends section 701(d)(2) of the 3–R Act by striking language that would now permit employees to become eligible for labor protection paid by the Federal Government for a period extending 18 months after the sale of Conrail. With this change, the Federal Government will be responsible for paying labor protection only for those employees who are deprived of their employment prior to the consummation of the sale.

This section also adds a new section 715 to the 3–R Act, which provides that after the consummation of the sale, NS and the acquirers of any of the divested rail lines and facilities shall pay New York Dock labor protection to any employee of Conrail, NS, or the acquiring railroads, who is adversely affected in his or her employment by the implementation of the Secretary's Plan. Under New York Dock labor protection, an eligible employee is entitled to receive up to six years of full salary, plus fringe benefits and moving expenses. Section 715 also provides that the arbitration provisions of section 4 of New York Dock shall apply to the formation of any implementing agreements that may be necessary in connection with the implementation of the Secretary's Plan, including any resulting coordinations.

SECTION 109.—PREFERENTIAL HIRING

This section amends section 703 of the 3–R Act to provide that any employee of any railroad who is deprived of employment as a result of the implementation of the Secretary's Plan shall have the first right of hire for a vacancy for which he or she is qualified on any NS rail subsidiary, except where such vacancy is covered by an

affirmative action plan or a hiring plan designed to eliminate discrimination.

This section was added by an amendment offered during the executive session to address the concern that some employees of other railroads might lose their jobs as a result of traffic diversions stemming from the NS–Conrail merger. This amendment provides protection similar to that afforded previously by Congress to employees of Conrail, the Milwaukee Railroad, and the Rock Island Railroad.

SECTION 110.—CROSS CRAFT EMPLOYMENT

This section amends the 3–R Act by adding a new section 703A to provide that any employee of Conrail or the other NS rail subsidiaries—Norfolk and Western Railway Company and Southern Railway Company—who is deprived of employment as a result of the implementation of the Secretary's Plan shall have the first right of hire for any vacancy for which he or she is qualified on any NS rail subsidiary, without regard to craft or class. The employee shall retain his or her seniority rights to return to the original craft or class whenever a vacancy occurs.

DOT and NS testified during the hearings that they expected no more than 1,200 Conrail and NS jobs to be eliminated as a result of the implementation of the Secretary's Plan. They also noted that the annual attrition rate on both Conrail and NS is higher than 1,200 employees, so that it was possible that few or no employees would actually be deprived of employment as a result of the jobs to be eliminated. However, neither of the witnesses were able to break down the attrition rate by craft or class. Accordingly, this section of the bill was added by an amendment offered during the executive session to address the concern that the attrition rate for the members of any one craft or class would not match the jobs eliminated in that craft or class. This amendment is intended to give the employees additional protection against employment deprivation.

Subtitle B—NERSA Amendments

SECTION 121.—SPECIAL COURT JURISDICTION

This section amends section 1152 of NERSA to extend the jurisdiction of the special court to review any action related to the enforcement, interpretation, or constitutionality of any provision of the Conrail Sale Amendments Act of 1985; the enforcement of the Secretary's Plan or the Definitive Agreements by the Federal Government or NS; the enforcement of certain ancillary agreements by those parties who entered into such agreements in accordance with the Secretary's Plan or the definitive agreements; the determination of the value of the interest of the employee stock ownership plan or of the beneficiaries thereof; or complaints brought by parties challenging DOT's determinations with respect to the enforcement of the covenants contained in the definitive agreements.

The special court is a three-judge Federal district court. It was established pursuant to the 3–R Act to conduct all of the judicial proceedings related to the final system plan, which is the plan pur-

suant to which Conrail was created in 1976. In turn, NERSA extended the court's jurisdiction to actions related to that act, because of the court's expertise in matters dealing with Conrail. This section extends the court's jurisdiction to actions related to S. 638 in order to take additional advantage of the court's expertise.

This section also amends section 1152 by adding a new subsection to allow a party, who believes he or she has suffered direct economic injury as the result of an alleged violation of a covenant contained in the definitive agreements, to make a complaint with the Secretary seeking enforcement of such covenant. If the Secretary decides to investigate the complaint, after notice and investigation, the Secretary shall make a final decision on the complaint within 60 days. If the Secretary finds that the covenant has been violated and the complainant has suffered direct economic injury as a result, the Secretary shall enter an order directing the party in violation to comply with the covenant. On appeal to the special court, any decision by the Secretary shall be upheld unless found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

The covenants negotiated by the Secretary and NS are intended to benefit a number of parties, including shippers, employees, and other railroads. Accordingly, these parties have an interest in seeing that the covenants are not violated. In view of this, the Committee believes it is appropriate for the parties to play some role in their enforcement. However, the Committee also is concerned about the possibility of unwarranted suits against NS and the acquirers of the divested lines. In order to balance these two concerns, the Committee added this subsection during the executive session. It allows parties to seek enforcement of the covenants, but requires them to act through the Secretary.

SECTION 122.—APPLICABILITY OF OTHER LAWS

This section amends section 1168(a) of NERSA to clarify that certain Federal laws are not applicable to actions taken to negotiate, approve, or implement the sale of Conrail by means of either a stock transfer or an assets transfer. It does this by striking the language "service transfers" and substituting "sale of the interest of the United States in the common stock of Conrail or transfer of the rail properties and freight service responsibilities of Conrail".

Section 1168(a) exempts the sale of Conrail from certain Federal laws in order to avoid extensive delays in the sale process. In drafting the provision, Congress intended the exemption to apply to either a sale by means of a stock transfer or one by means of an assets transfer. The term "service transfers" was used to refer to both types of transfers; however, it was not specifically defined in NERSA. Because it was not defined, its meaning could be questioned at this time. To avoid such questions, this section of the bill makes clear that section 1168(a) refers to both types of transfers.

Subtitle C.—Employee Stock Ownership Plan

SECTION 131.—RESPONSIBILITY OF EMPLOYEE STOCK OWNERSHIP PLAN FIDUCIARIES

This section amends section 216(f)(8)(A) of the 3–R Act to extend immunity against civil liability for trustees and other persons with responsibility for the Conrail ESOP, but only with respect to the actions they take in connection with the implementation of the Secretary's Plan.

SECTION 132.—QUALIFICATION, REVIEW, AND VALUATION OF EMPLOYEE STOCK OWNERSHIP PLANS

This section amends section 216(f) of the 3–R Act by adding two paragraphs. The first paragraph ensures that ESOP members will incur no Federal tax liability in connection with the contributions, allocations, and withdrawals of shares from the existing ESOP as provided for in the Secretary's Plan. Instead, such liability will be incurred when the ESOP assets are distributed to the members. The second paragraph exempts the issuance and sale or contributions of securities by NS to fulfill arrangements with Conrails employees in implementing the Secretary's Plan from Federal and State laws related to the approval and issuance and sale of securities.

The Conrail ESOP was established pursuant to the USRA Amendments of 1978 (Public Law 95–566), which required the ESOP as a condition to additional funding. Further, section 216(f)(8) of the 3–R Act, as added by the 1978 Amendments, provided for the creation of the Conrail Equity Corporation (CEC), as a Conrail subsidiary, and set forth the basic structure and operation of the ESOP, including the plan for annual contributions and a date for distribution of the ESOP participants' interest.

CEC now holds a substantial beneficial interest in Conrail, on behalf of about 80,000 participants in the ESOP. Participants in the ESOP include Conrail employees represented by a rail union ("agreement employees"), Conrail employees not represented by a union ("non-agreement employees"), retired Conrail employees, and designated beneficiaries of deceased Conrail employees. Beginning in 1980, Conrail has made annual contributions to the ESOP of shares of CEC preferred stock, representing 10 percent of the total CEC preferred. This preferred stock is convertible to Conrail common stock on a one-to-one basis, so that in 1991 when all the stock would have been converted and distributed to the employees, the ESOP would have enough shares of Conrail common stock to represent 15 percent of the total.

Under the terms of the MOI, NS has agreed to pay $375 million from its own cash or NS stock to the Conrail employees and other beneficiaries in order to buy out their 15 percent interest in the Conrail common stock and to satisfy any employee claims against Conrail arising from past wage concessions. The MOI does not specifically provide for an allocation of the $375 million between the ESOP and the wage concession claims, other than to state that "an amount determined to be the fair value" of the ESOP shall be allocated to the acquisition of the employees' interest. In addition, the

MOI provides that as a condition to closing, legislation shall be enacted "providing a mechanism for definitively valuing the existing Conrail employee stock ownership plan".

Neither this section nor any other section of the bill now contains a specific mechanism for valuing the ESOP and allocating the $375 million. This means that it will be necessary to offer an amendment containing such a mechanism when S. 638 is considered by the full Senate. The Committee notes that there are several different ways that the ESOP could be valued. The Committee also notes that the class of participants who would benefit from the buy-out of the ESOP is significantly broader than the class of employees who would benefit from the satisfaction of claims for past wage concessions. Moreover, the Federal tax impact of the two types of payments may vary.

Regardless of the valuation mechanism ultimately selected, the Committee intends to assure that all ESOP participants receive just compensation for their interests and that this compensation is available as soon as feasible after the date of enactment of S. 638. Further, the $375 million offered by NS is clearly sufficient to provide for just compensation for both the buy-out of the ESOP and the satisfaction of claims arising from wage concessions.

Title II.—Technical and Conforming Amendments

SECTION 201.—AMENDMENTS AND REPEALS

This section repeals provisions of the 3-R Act on the date the sale to NS is consummated. The changes are intended to reflect Conrail's conversion to a privately-owned railroad on that date. Specifically, this section:

(1) repeals subsections (a) and (b) of section 214, which authorizes appropriations for the Secretary and the Rail Service Planning Office of ICC to perform certain Conrail-related functions;

(2) repeals subsection (f) of section 217, which authorizes appropriations for the USRA to be used by Conrail, and appropriations for the Secretary to be used in facilitating the transfer of Conrail's commuter functions to other operators, in paying labor protection for Rock Island employees, and in facilitating the transfer of non-Conrail commuter functions to other operators;

(3) repeals section 404, which authorizes the sale of Conrail by alternative means if the Secretary determines with the concurrence of USRA that she is unable to sell the common stock of Conrail under section 401;

(4) repeals section 405, which provides for the sale of Conrail by means of a transfer of its assests and service responsibilities;

(5) repeals section 406, which sets forth the criteria that a sale of Conrail under section 405 must meet;

(6) repeals section 407, which provides for public comment and congressional review of a sale of Conrail under section 405;

(7) repeals subsections (a) and (d) of section 408, which provides for the actual transfer of assets and service responsibil-

ities following congressional review under section 407 and for the sale date for such a transfer, respectively;

(8) repeals section 409, which provides that any transfer of assets and service responsibilities under section 408 shall be deemed an assignment of all obligations under any applicable agreements or leases with respect to such rail assets;

(9) repeals section 410, which directed Conrail in January 1982 to identify and sell any of its subsidiaries (other than CEC) that did not operate at a profit;

(10) repeals section 411, which provides for the negotiation of implementing agreements to govern the transfer of employees along with any transfer of Conrail assets and service responsibilities under title IV of the act;

(11) repeals section 412, which provides for New York Dock labor protection for employees who are adversely affected by any sale of Conrail under title IV of the act; and

(12) repeals section 713, which authorizes appropriations for the payment of Conrail labor protection and termination allowances as provided for by sections 701 and 702, respectively, of the act.

SECTION 202.—AMENDMENTS AND REPEALS OF OTHER RAIL LAWS

This section amends or repeals non-3–R Act provisions of the law on the date the sale to NS is consummated. The changes are intended to reflect Conrail's conversion to a privately owned railroad on that date. Specifically, this section:

(1) repeals section 1154 of NERSA, which subordinates all U.S. claims against Conrail to any other valid claim;

(2) repeals section 1161 of NERSA, which established a Government role and procedure for disposition of Conrail's light density lines;

(3) repeals section 1166 of NERSA, which provides that the ICC may approve the grant of trackage rights to any terminal railroad over Conrail lines in the City of Philadelphia;

(4) repeals section 1167(c) of NERSA, which directed the clerk of the Special Court in August 1981 to transfer to DOT the Series B preferred stock and common stock of Conrail that was on deposit with the court;

(5) repeals section 1168(b) of NERSA, which exempts Conrail from State full crew and related laws; Conrail would continue to be exempt from such laws under section 711 of the 3–R Act;

(6) amends section 501(8) of the 4–R Act to delete that part of the definition of "restructuring" that refers to certain transfers of rail services by Conrail to other railroads or entities;

(7) amends section 505 of the 4–R Act to eliminate the priority for preference share monies accorded to certain transfers of rail services by Conrail to other railroads or entities;

(8) repeals subsection (b)(1) of section 509 of the 4–R Act, which provides that $200 million of the funds appropriated under the preference share program shall be transferred for use in implementing the Conrail workforce reduction program established pursuant to section 702 of the 3–R Act;

(9) amends subsection (e) of section 511 of the 4–R Act to eliminate the set-aside of loan guarantee monies for use in the improvement of the Northeast Rail Corridor, which was transferred to the National Railroad Passenger Corporation pursuant to the 3–R Act;

(10) repeals section 402 of the Rail Safety and Service Impoundment Act of 1982, which provides that any financially responsible person shall be eligible to apply for preference share monies under section 505 of the 4–R Act in order to provide common carrier rail service on rail lines abandoned by Conrail;

(11) amends section 1005(b)(1) of the Rail Passenger Service Act to eliminate the reference to Conrail in connection with the promotion of private sector passenger rail corridors;

(12) amends section 10362(b)(7)(A) of title 49, United States Code, to eliminate the reference to Conrail from the duties of the ICC's Rail Services Planning office; and

(13) amends section 332(d) of title 49, United States Code, to eliminate the reference to Conrail from the list of entities directed to provide information to DOT's Minority Resources Center.

Title III.—Miscellaneous Provisions

SECTION 301.—COMMON CARRIER STATUS OF CONRAIL AFTER SALE

This section states that Conrail's status as a common carrier by railroad under title 49, United States Code, shall not be affected by virtue of the sale. Further, it states that NS, a holding company, is not converted into a common carrier by railroad as a result of its purchase of Conrail.

This section also provides that the definitive agreements shall contain a binding commitment by NS to continue to operate Conrail in full compliance with the provisions of section 10731(e) of title 49, United States Code, which places a statutory cap on rail freight rates for the transportation of recyclable and recycled materials other than iron or steel scrap.

Since 1981, Conrail has maintained a rate system that generally complies with the maximum rate requirements of section 10731(e). The Committee added this provision during the executive session in order to be certain that the transfer of Conrail to private ownership would not result in future noncompliance by Conrail, or by any rail system into which it may be merged or integrated. NS has assured the Committee that this would not occur if it purchases Conrail. This provision simply puts that commitment into statutory terms.

SECTION 302.—CONSUMMATION OF SALE

This section defines the time the sale of Conrail is consummated as the date on which title to the common stock passes to NS and the United States receives the cash purchase price.

SECTION 303.—CONTRACTS

This section states that except as provided in this section, the sale of Conrail to NS shall not affect Conrail's obligation or the ob-

ligation of any transferee of divested assets to carry out Conrail's transportation contracts and equipment leases, equipment trusts, and conditional sale agreements in accordance with their terms. The exception to this general rule, as stated in this section, applies in those instances where: (1) Conrail is precluded by a divestiture pursuant to the Secretary's Plan from providing the tansportation service for which it has contracted; (2) the contract does not contain a clause providing for the termination of the contract in the event Conrail is sold pursuant to title IV of the 3-R Act; and (3) the divestiture will result in a change or modification in the movement of the traffic which is the subject of the contract. In such instances, the transferee of the divested assets and Conrail shall provide the contracted for service on terms and conditions which, to the maximum extent possible, conform to the terms and conditions in the contract.

Under normal rules of contract law, the sale of Conrail's stock would not have any effect on Conrail's obligation to honor the terms and conditions of its contracts and agreements. Nevertheless, the Committee agreed during the executive session to amend the bill to add this section in order to make clear the Committee's objective that the sale not adversely affect such contracts and agreements.

SECTION 304.—CONGRESSIONAL OVERSIGHT OF COMPLIANCE

This section provides that the Secretary shall, no later than January 31 of each year, submit a report to the Senate Committee on Commerce, Science, and Transportation and the House Energy and Commerce Committee setting forth the certificates submitted to the Secretary by NS and Conrail certifying compliance with the convenants contained in the definitive agreements.

The MOI states that after the sales NS and Conrail shall submit to the Secretary on a quarterly basis Certificates certifying compliance with the post closing covenants set forth in paragraph 12 of the MOI. Paragraph 12 lists the 5-year service and financial convenants agreed to by NS, and states that the definitive agreements shall include these covenants.

The fact that NS agreed to the covenants is one of the primary reasons why the Committee approved the sale of Conrail to NS. Accordingly, it is important to the Committee, as well as the Secretary, to be assured that after the sales NS complies with the covenants. For this reason, the Committee, approved an amendment during the executive session adding this section to the bill.

SECTION 305.—SEPARABILITY

This section states that if any provision of this bill or its applications is held invalid, the remainder of the bill and its application shall not be affected by that invalidation.

SECTION 306.—EFFECTIVE DATE

This section states that with exception of those provisions contained in sections 108(a), 201, and 202, the provisions of this bill shall become effective on the date the bill is enacted. The provi-

sions contained in sections 108(a). 201, and 202 shall become effective on the date of consummation of the sale of Conrail to NS.

Rollcall Votes in Committee

In accordance with paragraph 7(c) of rule XXVI of the Standing Rules of the Senate, the Committee provides the following record votes during its consideration of S. 638:

On amendment offered by Senator Pressler regarding joint rates, through routes and other arrangements, and interchanges and gateways:

YEAS—3	NAYS—14
Mr. Pressler	Mr. Danforth
Mr. Long	Mr. Packwood [1]
Mr. Exon	Mr. Goldwater
	Mrs. Kassebaum [1]
	Mr. Gorton
	Mr. Stevens
	Mr. Kasten
	Mr. Trible
	Mr. Hollings
	Mr. Inouye
	Mr. Ford
	Mr. Riegle
	Mr. Gore [1]
	Mr. Rockefeller

On motion to report S. 638, with amendments:

YEAS—12	NAYS—5
Mr. Danforth	Mr. Pressler
Mr. Packwood [1]	Mr. Ford
Mr. Goldwater	Mr. Riegle
Mrs. Kassebaum [1]	Mr. Exon
Mr. Gorton	Mr. Rockefeller
Mr. Stevens [1]	
Mr. Kasten	
Mr. Trible	
Mr. Hollings	
Mr. Long	
Mr. Inouye	
Mr. Gore	

[1] By proxy.

Agency Comments

U.S. Congress,
Congressional Budget Office,
Washington, DC, June 6, 1985.

Hon. John C. Danforth,
Chairman, Committee on Commerce, Science, and Transportation, U.S. Senate, Washington, DC.

Dear Mr. Chairman: Thank you for your letter of May 20 regarding the sale of Conrail, in which you asked us to analyze a variety of options regarding the proposed sale. Your letter also asks

for an "economic analysis" of the proposal. Unfortunately, time does not permit us to provide you with such an analysis in this letter. Such a detailed analysis would go beyond the immediate budgetary effects of the sale and would include a discussion of such issues as whether or not the government should be in the railroad business, the alternative mechanisms for divesting itself of Conrail, and how these mechanisms deal with the risk inherent in the future of Conrail. CBO is, in fact, in the process of preparing such an analysis for the Commerce, Transportation, and Tourism Subcommittee of the House Energy and Commerce Committee, which we will be pleased to share with you when it is completed.

Many of the options you asked us to analyze can be found in the attached cost estimate. Specifically, however, you asked us to examine the following issues.

1. *Discounting future costs to the federal government.*—For purposes of comparing the overall financial costs and benefits of the sale proposal, future costs and revenues to the federal government should be discounted for as long as the sale of Conrail has budgetary effects. However, the choice of an arbitrary cut-off year will influence the results. For example, were the proceeds for the sale of Conrail and the attendant costs to the federal government discounted over the period 1986–1990, then the sale of Conrail would pose a net present value financial gain to the federal government under our base case assumptions. But if the discounted costs and revenues were defined over a longer period, then the sale might produce a net financial loss, since the loss of debenture interest and preferred stock dividends to the government and the possible tax losses associated with the sale may continue well into the future. The conclusion to be drawn is that discounting a truncated stream of costs and revenues cannot provide a definitive answer to the question: "What is the net effect of the sale on the financial position of the government?"

2. *Using United States Railway Association (USRA) projections of Conrail net income.*—In the cost estimate, we provided an estimate of the overall 1986–1990 budgetary effect of the proposal. The estimate was based on USRA projections of Conrail's performance, after adjusting them to make them consistent with the macroeconomic forecast assumed in the Senate Budget Resolution. In that same cost estimate, however, we discuss how the estimate changes if the recession assumed in the USRA projections remains uncorrected. The other technical adjustments made to the USRA forecast are essential for any estimate that uses current law as its base.

3. *Assumption of federal labor protection costs.*—The attached cost estimate assumes that the acquiring railroads assume Conrail's labor protection costs, now paid by the federal government. This reduces federal outlays by approximately $10 million per year over the 1986–1990 period. Our estimate is consistent with layoffs of between 1,200 and 1,800 employees per year.

4. *Payment of debenture interest and stock dividends.*—In our cost estimate, we assume that, if Conrail is not sold, then payments would be made to the government for interest on debentures and dividends on preferred stock in the base case, according to the financing agreement between Conrail and the USRA. Clearly, if the financing agreement were waived and no payments to the govern-

ment were anticipated in the base case, there would be no budgetary effect of forgiving the debt, and Conrail would retain the resources we currently assume are paid to the government.

5. *Alternate determination of fair market value and the applicability of the de minimus exception.*--Neither CBO nor the Joint Committee on Taxation has made an independent assessment of the fair market value of Conrail. It is unclear what, if any, such an assessment would have on the ultimate budgetary impact of the sale. The issue of "fair market value" is often raised insofar as it is used to apply the *de minimus* exception, one of the several criteria that determine the extent to which Conrail's depreciable basis will be available to offset income produced elsewhere within the Norfolk Southern Corporation. But the relevant "fair market value" that must be known to apply the *de minimus* exception may have to be constructed on an asset-by-asset basis, rather than for Conrail as a whole.

If the *de minimus* exception did not apply, then the built-in loss limitation might apply, limiting Norfolk Southern's ability to use Conrail's depreciable basis to reduce tax liability generated by non-Conrail portions of the merged corporation. This might substantially reduce the revenue loss associated with the sale, but a precise estimate depends upon a variety of factors. In the cost estimate of S. 638, we provide a Joint Committee on Taxation estimate of the revenue impact of effectively reducing depreciable basis by 25 percent. These issues are more extensively discussed in "Description of the Revenue Provisions of H.R. 1930 and Background Relating to the Proposed Transfer of Conrail to the Norfolk Southern Corporation," a Joint Committee on Taxation print.

Please contact me if we can be of additional assistance.

With best wishes,

Sincerely,

RUDOLPH G. PENNER, Director.

U.S. DEPARTMENT OF TRANSPORTATION,
FEDERAL RAILROAD ADMINISTRATION,
Washington, DC, April 15, 1985.

Hon. ALBERT GORE, Jr.,
U.S. Senate,
Washington, DC.

DEAR SENATOR GORE: I write to provide the followup information you requested on the CSX Corporation's threat to abandon service on the Baltimore and Ohio Railroad (B&O) should Norfolk Southern succeed in acquiring Conrail. There is no basis for that threat, and it is unfortunate that CSX would use this tactic, with its own employees, in an effort to build a political base against the Norfolk Southern-Conrail merger.

First, it is essential to recognize that no railroad can abandon service on a line simply because it feels like doing so. ICC regulations are clear and specific in permitting abandonment of service only when volumes have fallen on the lines involved, to the point where the lines are noncompensatory. Even then, the Commission must make a finding that the public interest is best served by per-

mitting the abandonment, a finding that is normally predicated on data indicating that losses on the lines are so severe that they threaten service in other parts of the railroad system. The criteria are extremely clear, and railroads rarely file abandonment petitions unless the financial statistics on their lines meet these criteria in a clear and convincing fashion. This reticence to file abandonment petitions unless performance has clearly deteriorated below the statutory criteria is the reason why so few abandonment petitions are actually denied.

By no stretch of reason or numerical sleight of hand could the performance on the B&O lines come close to the Commission's abandonment criteria. While these are not major trunk lines, they are solid lines with good volume and profit performance. Last year, 26.5 billion—that's billion—revenue ton-miles of traffic moved on the B&O lines. I made this point at the Committee's initial Conrail hearings, and CSX responded by arguing that "it is not how much traffic flows over a line, it is how much income is generated." That argument holds no greater validity. Last year, the B&O lines, in addition to producing $1.1 billion in freight revenue, generated a net profit from operations for CSX Corporation of 5.4 percent.

These lines operate in a region where they already receive vigorous competition from both Conrail and Norfolk Southern, as well as a number of the regional railroads. There is nothing in our assessment of post-merger traffic flows that would so alter their performance as to bridge the enormous gap between profitability and the type of sustained losses required to justify an abandonment.

Second, we are obviously not the only ones to have that view. Tim Mellon, owner of the Guilford system, has stated on the record that should CSX make an effort to sell the lines, he would buy them. Bob Claytor of Norfolk Southern made essentially the same statement at the press conference in which the Secretary announced Norfolk Southern's designation. And while these two carriers may be the only ones who have spoken publicly, the location of these lines and the depth of their traffic volume suggests to us at FRA that they would be hotly pursued by other rail carriers should they ever be offered for sale. And that is precisely the reason why they will not be.

Third, there is another and probably more conclusive reason why they would not be subject to abandonment. The B&O employs approximately 12,000 employees on these lines, each of whom would be entitled to the standard labor protection arrangements known as New York Dock and Oregon Short Line. Under these provisions, each employee is, in essence, guaranteed up to six years' full salary following the date on which he loses a job due to line abandonment or merger with another carrier. The cost in labor protection of abandoning the B&O lines would run in the two to three billion dollar range—astronomical figure, far outweighing anything CSX could receive for sale of the assets.

Generally, when a railroad files for abandonment of a line, volumes have fallen on that line to the point where few employees service the business, and labor protection expenses are extremely minimal. Exactly the opposite is the case here, and the financial impact of these labor protection payments is an insurmountable obstacle to the course of action CSX is threatening.

The battle CSX is waging is not one of economic survival. It is, instead, a "Hertz-Avis" battle. At present, CSX is Hertz—the dominant carrier in the East, with 26,000 miles of track to Norfolk Southern's 18,000. It generated $7.9 billion in revenues to NS' $4 billion, serves 6,444 stations in comparison to the 3,257 on the NS system. After the merger, NS-Conrail will be slightly larger than CSX—30,000 miles, in comparison to 26,000 miles on the CSX system. But CSX will still be a larger company in revenues, $7.9 billion to $7.5 billion. NS-Conrail will now be Hertz, and CSX will be Avis. But it is highly significant to note that the disparity in their size will be only half as great after the merger as it is today.

I can fully understand why any corporate management would resist an effort by their principal competitor, to become a stronger competitor. It is simply unfortunate that the carrier would threaten the jobs of their employees as a tactic to accomplish its objectives.

These threats are not valid, and pose no public policy reason why Conrail should be denied the financial stability that would result from an NS acquisition, and why consumers should be denied the lower single-line rates it would produce.

Thank you for taking the time to consider these points, and review this rather lengthy response.

Yours very truly,

JOHN H. RILEY, *Administrator.*

U.S. DEPARTMENT OF JUSTICE,
ANTITRUST DIVISION,
Washington, DC, April 8, 1985.

Hon. JOHN C. DANFORTH,
Chairman, Committee on Commerce, Science and Transportation, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: This letter responds to your letter of March 8, 1985, concerning the Department of Justice's analysis of the competitive effects of the proposed acquisition of Conrail by Norfolk Southern. In your letter you requested that we address several contentions raised by Mr. Kelvin Dowd of the Eastern Coal Transportation Conference and Mr. Hays Watkins of CSX Corporation. You also asked us to respond to five questions from Senator Trible enclosed with your letter.

First, in his testimony to the Committee, Mr. Dowd stated that the Justice Department's analysis of the competitive impact of the Norfolk Southern purchase contains "significant deficiencies and omissions * * * which seriously impugn the credibility of its conclusions." The major "deficiencies and omissions," according to Mr. Dowd, are: (a) the scope of the Department's analysis of competitive markets is overly narrow because it is based on the so-called "50/10 test" rather than the Herfindahl-Hirschman Index (HHI) threshold used to measure market concentration in the Department's Merger guidelines; (b) the Division's diversions analysis; (c) the Division's screening procedure; and (d) the Division's failure to consider the potential impact of the acquisition on coal transportation, particularly export coal.

With respect to Mr. Dowd's first contention, the Department of Justice has never applied an HHI threshold in analyzing rail mergers because the HHI does not adequately measure the competitive consequences of such mergers. Using the principles of market definition found in the Merger Guidelines, we often find that in railroad mergers—including this one—a relevant market includes firms that provide competitive alternatives through a variety of transportation modes, including truck and barge lines as well as other railroads. The HHI is an unsatisfactory tool to use under these conditions because the company-specific data needed for HHI analysis are generally unavailable for non-rail competitors, and it is often impossible to estimate accurately the ability of non-rail competitors already serving the market to expand their shares in response to possible increases in rail rates. Conversely, since the 50/10 test is applied only to rail data, that test generally will tend to overstate the actual concentration of all competitors in a relevant market. In rail mergers, therefore, the Department uses a series of screens other than the HHI, including the 50/10 test, that in combination generate the information necessary to identify areas of competitive concern.

The Department employed the 50/10 criterion in its analyses of the Chessie/Seaboard merger and the Union Pacific/Missouri Pacific/Western Pacific merger, and we used a similar test ("50/greater than zero") in our recent analysis of the proposed sale of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company. The Department is also using a 50/10 screen as part of its analysis of the proposed Santa Fe/Southern Pacific merger. Mr. Dowd is therefore incorrect in suggesting that the Department has departed here from its standard approach to analyzing rail mergers.

Mr. Dowd's second contention concerns diversions and assumes that we ignored diversions in conducting our analysis. This assumption also is incorrect. In fact, we determined that given the proper implementation of the divestiture we have proposed, the regional carriers whose survival might have been jeopardized due to merger-related parallel diversions can continue to operate via friendly connections through which they can serve most of their current customers. The survival of carriers that will chiefly suffer diversions as a result of the end-to-end linking of rail tracks also will not be jeopardized, since traffic diversions from them are likely to be small relative to their total revenues. In short, no failures of regional carriers should result from either parallel or end-to-end diversions associated with the merger.

Moreover, end-to-end linkage is often beneficial to shippers because it enables them to reach, via single-line service, destinations that could previously be reached only through join-line service. By eliminating the need for an interconnection and related costs, and by increasing efficiency, single-line service resulting from a merger often provides lower cost and greater convenience to shippers; in other words, diversions are often the result of informed consumer choices.

Mr. Dowd's third contention concerns that Department's screens. In particular, Mr. Dowd questioned the Department's alleged decision to exclude from consideration markets where "non-rail competition appeared to be significant," where "the major shipper in the

markets supported the merger" or where "the total revenues affected were small." In fact, the Department did not exclude from consideration markets in which non-rail competition appeared to be significant. Rather, consistent with our prior rail merger analyses, we explicitly took into account intermodal competition in an effort to identify those markets in which competition from non-rail carriers would not merely be significant but would effectively curtail potential abuse of market power by railroads. We did this largely by examining highly disaggregated, commodity-specific rail and non-rail traffic data, and we sought to verify our results through the shipper surveys. To the extent that we found that other modes of transportation were not substitutable for rail transportation in problem markets we identified, we included those markets in Appendix B of Assistant Attorney General McGrath's letter of January 29, 1985, to Secretary Dole as "problem" markets. Most of the remaining problem markets involved movements of bulk commodities as to which non-rail transportation does not provide a reasonable alternative.

As for our reliance on the responses of major shippers, this too is in keeping with our normal investigation methodology. During the Antitrust Division's merger investigations, we interview customers who might be affected by the transaction to obtain knowledge about the markets involved and to ascertain the likely competitive effect of the acquisition in those markets. In this particular investigation, we used the information obtained from shippers primarily as a check on information already available to us from other sources. As a practical matter, because the rational underlying the shippers' responses to our questions was not always clear, we rarely decided to include or exclude markets solely on the basis of opinions expressed to us by shippers. We were, however, more likely to rely on shipper responses when they brought to our attention relevant information of which we had been unaware. Moreover, even markets that were deleted based on shipper responses will often be benefitted by the proposed divestiture. For example, the divestiture specifically addresses the situation of Lorain County, Ohio, even though the shipments of a major rail user located there—Ford Motor Company—were deleted because Ford expressed support for the merger.

We also deleted from our list of problem markets certain markets where the "total revenues affected were small." We did this not only because it would have been impossible to analyze every market that might be effected in some small way by the merger, but also because we believed that certain efficiencies to be realized by this merger will benefit shippers as a whole to some degree. It is important to note that the problem markets eliminated in this manner were very small indeed; the annual rail revenues involved in each were less than $2 million and represent less than one train load per week for the movement of most commodities. Moreover, as Assistant Attorney General McGarth reported to Secretary Dole in a letter dated March 26, 1985, a copy of which is enclosed, the Division recently reexamined counties that are served exclusively by Norfork Southern and Conrail. In our reexamination, we did not place a lower limit on the revenues generated annually (i.e., we did not use the $2 million/year screen). This reexamination revealed

less than $1 million in additional "problem" revenues that will not be alleviated by the required divestiture.

A further comment on the use of "screens" in analyzing railroad mergers may be helpful. Large railroad mergers typically affect in some way hundreds, if not thousands, of markets involving a wide range of products in a variety of locations. Depending on the merger, some of these markets may be affected adversely due to a reduction in competition, while others are likely to benefit from improved service provided in the future by a more efficient post-merger competitor. Because of the intractability of any analysis that would seek to deal individually with the myriad of merger effects, the use of screens like those employed here is the typical mode of analysis in the context of rail mergers. At each stage of the screening procedure, markets are removed from consideration when it becomes clear that the merger is unlikely to create or worsen competitive problems. Thus, competitive problems can effectively be identified without unduly complicating and unreasonably delaying the analysis through straining to obtain data about markets for which the transaction does not pose competitive concerns.

In response to Mr. Dowd's last contention, we explicitly considered the impact of the acquisition on coal shippers and customers. The primary reason why we identified relatively few markets where the merger was likely to create a competitive problem in the shipment of coal is that Norfolk Southern and Conrail seldom compete to serve either the same coal origins or the same coal destinations. With respect to domestic coal movements in particular, we interviewed 72 ultility customers that receive coal either directly or indirectly from Norfolk Southern or Conrail or both. Very few of these customers indicated that they would be adversely affected by the merger. The vast majority were already served by only one of the two railroads or were not concerned about the competitive effect of the merger because they were receiving their coal requirements by water or truck. However, we did identify several coal destinations as possible problem markets. These destinations, which are listed in Appendix B of our January 29, 1985, letter to Secretary Dole, generally represent coal moving to steel companies. Many of these steel companies were contacted and their comments were taken into account in our analysis.

As for export coal, the evidence suggests that to the extent that eastern railroads possess significant pricing power in the world maket for coal (and is questionable whether or not, they do), Conrail is not a major carrier of that coal and does not provide a significant competitive check on whatever ability Norfolk Southern and CSX might already have to raise export coal rates to the disadvantage of export coal shippers. This conclusion is consistent with the findings of a 1981 National Economic Research Associates study commissioned by the Coal Exporters Association. That study determined that more than 90 percent of all export coal was at that time being carried by CSX and/or Norfolk Southern, that the projected capacity of Conrail's Philadelphia port was very small relative to the facilities of CSX and Norfolk Southern, and that coal to which Conrail's lines have access is not typically of a type demanded by foreign customers. Verified Statement of National Economic

Research Associates, Inc., *Railroad Exemption-Export Coal [Ex Parte No. 346 (Sub-No. 7)]*, filed before the Interstate Commerce Commission, December 18, 1981.

You have also asked us to comment on the testimony of Mr. Hays T. Watkins, Chairman and Chief Executive Officer of CSX Corporation, concerning a meeting that CSX representatives had with Antitrust Division personnel regarding the sale of Conrail. Specifically, Mr. Watkins testified that the Justice Department told CSX during 1984 that any bid made by CSX or Norfolk Southern for Conrail would be opposed on antitrust grounds. I understand, however, that Mr. Watkins never met with the Department on this matter and perhaps for that reason his statement—which apparently was based upon representations made to him by others—is inaccurate in certain important respects.

The facts as we know them are that on April 27, 1984, Mr. Elliott M. Seiden, Chief of the Antitrust Division's Transportation Section, and members of his staff met with Messrs. John Snow and Mark Aaron of CSX in Mr. Seiden's office, at the request of Mr. Snow. At the meeting, Mr. Snow told Mr. Seiden that CSX was concerned that Norfolk Southern was seriously considering making a bid for the purchase of Conrail. Mr. Snow indicated that CSX had already analyzed whether a purchase of Conrail by either Norfolk Southern or CSX could satisfy our antitrust standards. Mr. Snow further stated that CSX had concluded that neither carrier could meet the standards that the Department of Justice had established in previous merger proceedings at the ICC. In light of this CSX analysis, Mr. Snow asked Mr. Seiden to respond to two questions: (1) Would the Department of Justice participate in the Department of Transportation's consideration of the various bids for Conrail that would be made later in the year; and (2) Would the Department of Justice support a request that CSX had contemplated making to the Department of Transportation for the convening by the Secretary of Transportation of a section 401 conference (under Section 401 of the Railroad Revitalization and Regulatory Reform Act of 1976, 49 U.S.C. § 333(d)) would have as its objective carving up Conrail into two systems, one to be controlled by Norfolk Southern and the other by CSX. Mr. Snow indicated that this could be accomplished in such a way as to enhance competition in the East by creating two-carrier service to New York and New Jersey (where one-carrier service now exists). In Mr. Snow's view, this would have compensated for the reduction in the number of competing railroads in the Midwest from three to two.

After hearing Mr. Snow's presentation, Mr. Seiden responded that the Department of Justice had not yet begun to analyze any possible rail consolidations involving Conrail since the bidding process had not been completed. Mr. Seiden emphasized that the Department's staff had done little more than look at some route maps, and therefore was in no position to assess the competitive consequences of any particular consolidation. As for the Department's participation in the DOT selection process, Mr. Seiden indicated that the Department was confident it would have a direct and substantive role in that process. He indicated, specifically, that Assistant Attorney General McGrath and Deputy Secretary of Transportation Burnley had already agreed that the Department

would play a major substantive role in analyzing the competitive consequences of particular consolidations as they came to light and that the working relationship between the two Departments was excellent. Mr. Seiden concluded that Mr. Snow should be reassured that the Department of Justice's competitive analyses would indeed be brought to bear, if that appeared necessary or desirable. Finally, Mr. Seiden indicated that the possibility of convening a Section 401 conference was an idea that had not previously been broached and that he could not provide an immediate reaction. He indicated, however, that if the matter were to be given further attention, it would be considered on the merits.

In sum, at no time during this conversation or any other conversation between Department representatives and CSX did anyone from the Department express an opinion on the competitive consequences of any merger involving Conrail, much less focus on a possible CSX-Conrail or Norfolk Southern-Conrail consolidation.

As to the questions raised by Senator Trible concerning the Richmond, Fredericksburg and Potomac Railroad Company (RF&P), the Department recently has responded to most of them in a letter to Mr. John J. Newbauer, Jr., President to RF&P, a copy of which is also enclosed. In that letter, I pointed out that while the Department did not examine specifically the question whether RF&P could continue to compete on the Potomac Yard-Richmond route, we did examine the possible effect of diversions on CSX Corporation, and concluded that the diversions would not be so large as to jeopardize the railroad. We have assumed that such an analysis is sufficient with respect to RF&P since, while that railroad is only 34 percent owned by CSX subsidiaries, CSX controls 63 percent of its voting stock and provides the bulk of the railroad's traffic. As to protections that RF&P desires to have to ensure the continued flow of traffic over its lines, I can only reiterate the Department's position concerning such "DT&I conditions." Such conditions are, in effect, market allocations and pricing agreements that undermine the ability of merging carriers to realize the efficiencies that could otherwise be realized through their merger. Thus we would not suggest amendments to the Conrail legislation that would ensure that RF&P could maintain its current market position.

I trust this information fully responds to your letter and will be helpful to the Committee.

Sincerely,

CHARLES F. RULE,
Acting Assistant Attorney General,
Antitrust Division.

U.S. DEPARTMENT OF JUSTICE,
ANTITRUST DIVISION,
Washington, DC, March 26, 1985.

Hon. ELIZABETH H. DOLE,
Secretary, Department of Transportation, Washington, DC.
Washington, DC.

DEAR SECRETARY DOLE: This letter is to update you on the Department's analysis of the competitive implications of the proposed sale of Consolidated Rail Corporation ("Conrail") to Norfolk Southern Corporation ("Norfolk Southern"). As part of our continuing review of the proposed merger, we have determined that useful information on the competitive impact of this acquisition can be gained from the use of an additional screen. In particular, the staff has identified those counties where Norfolk Southern and Conrail provide the only available rail service, but where we did not detect significant competition between them through our use of the ICC Waybill sample and the 50/10 screen.

To undertake this additional analysis, the staff used the Conrail and Norfolk Southern 1983 traffic tapes. Using this data we identified every instance in these exclusively-served counties where both railroads originated or terminated the same commodities. We then applied the same screens (with the exception of the 50/10 and the $2 million minimum revenue screens) as are described in my January 29, 1985, letter to you. Using this methodology, we found that, in addition to the counties identified in my original letter, competition is likely to be reduced for movements to and from the following counties: Sandusky, Crawford and Coshocton, Ohio; and Howard, Blackford and Wabash, Indiana. These movements, which are reflected in the attachment to this letter, involve $11.3 million of problem revenues.

With respect to these movements, it appears that our proposed divestiture will provide for service to at least some of the counties. Under one proposal currently being discussed by Norfolk Southern and another carrier, we understand that all of these counties except Sandusky (which accounts for $794,108 of problem revenues) would be served by the independent entity. Since we have now identified these markets as markets which will be adversely affected, we will seek to ensure that they are served, just as we will seek to ensure that all affected counties in the divestiture corridor will be able to obtain competitive service. If this is accomplished, the proposed divestiture will assure that most shippers who would have been adversely affected by this merger will be able to continue to receive competitive service once the divestiture is implemented.

Sincerely,

J. PAUL MCGRATH,
Assistant Attorney General,
Antitrust Division.

U.S. DEPARTMENT OF JUSTICE,
ANTITRUST DIVISION,
Washington, DC, April 3, 1985.

Mr. JOHN J. NEWBAUER, Jr.,
President, Richmond, Fredericksburg & Potomac Railroad Co., Richmond, VA.

DEAR MR. NEWBAUER: This letter responds to your March 1, 1985 letter concerning the acquisition of Conrail by the Norfolk Southern Railroad. In your letter you expressed concern about diversions resulting from this merger and their effect on your railroad. You also recommended the imposition of traffic protective conditions to remedy this effect.

The Department of Justice did consider the impact of diversions in its analysis. As we state in our letter to Secretary Dole, however, we do not ordinarily view diversions to be anticompetitive. Rather, we ordinarily view diversions as symptoms of more efficient routing created by a merger. Accordingly, diversions are not of concern to us except in those rare instances where they may be so great as to threaten the viability of an otherwise healthy regional competitor. Here we do not believe viability is at issue. Given the divestiture we have proposed in our letter to Secretary Dole, we do not believe that any regional carrier will fail as a result of diversions alone. Moreover, because of RF&P's close commercial relationship to CSX, we do not believe your railroad will fail as a result of Norfolk Southern's acquisition of Conrail.

You also requested the imposition of traffic protective conditions on behalf of RF&P. Such conditions are commonly referred to as DT&I conditions from the 1950 *Detroit, Toledo and Ironton Railroad* consolidation proceeding, 275 I.C.C. 455 (1950). The Interstate Commerce Commission ("ICC") routinely imposed this package of conditions upon rail mergers for many years. More recently, however, with the Department's encouragement and approval the ICC has adopted a very different attitude toward such conditions, recognizing that they create "anti-competitive consequences which far outweigh any procompetitive effects." *St. Louis Southwestern Railway Company,* 363 I.C.C. 323 (1980). Thus, the Commission has refused to impose new DT&I conditions and is now trying to eliminate such conditions that were imposed on previously approved mergers. *Rulemaking Concerning Traffic Protective Conditions in Railroad Consolidation Proceedings,* Ex Parte No. 282 (Sub. 5), 366 I.C.C. 112 (1982). The Department of Justice supports the ICC's policy, and we think it would be an anticompetitive step backwards to impose them in this merger. Therefore, we did not recommend them as part of the divestiture plan.

I hope this letter has been responsive to your questions.

Sincerely,

CHARLES F. RULE,
Acting Assistant Attorney General,
Antitrust Division.

DEPARTMENT OF THE TREASURY,
Washington, DC, March 27, 1985.

Hon. JOHN C. DANFORTH,
Chairman, Subcommittee on Surface Transportation, Committee on Commerce, Science and Transportation, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: This is in response to your request for our views of the Federal income tax policy issues raised by the proposed sale of the Federal government's interest in the Consolidated Rail Corporation ("Conrail") to Norfolk Southern Corporation ("Norfolk"). In preparing this response, we have not comprehensively examined all potential Federal income tax consequences of the proposed sale, but have limited our analysis to certain issues of tax policy raised by the Federal government's ownership of Conrail and the form of the proposed transaction. In addition, our analysis has assumed that the details of the proposed transaction are accurately reflected in the Memorandum of Intent signed February 8, 1985 by Norfolk and the Department of Transportation, and in H.R. 1449 and S. 638, the pending legislation that would authorize and establish terms for the sale of Conrail.

We have previously consulted with the Department of Transportation with regard to its Congressionally mandated plan for the return of Conrail to the private sector. We thus have advised the Department of Transportation as to Federal income tax aspects of the sale of Conrail and have reviewed the tax implications of the bids for Conrail and of draft language for the Memorandum of Intent and enabling legislation. Our prior advice and the conclusions set forth in this response have been guided by two basic policy objectives: (1) that the sale of Conrail should not provide the purchaser with Federal income tax benefits that would not be available in an analogous transaction between private parties; and (2) that the Internal Revenue Service (the "IRS"), in its role as administrator of the Federal income tax laws, should not be prevented by the sales agreement or enabling legislation from treating Conrail in the same manner as it would any other taxpayer. Based on our analysis of the Memorandum of Intent and the enabling legislation, we believe that the proposed sale is basically consistent with these policy objectives.

Background

Section 401 of the Regional Rail Reorganization Act of 1973 enacted by the Northeast Rail Service Act of 1981 directed the Department of Transportation to devise a plan for returning Conrail to the private sector, preferably by sale of common stock rather than by a sale of its assets. Under current law there are significant differences in the Federal income tax treatment of a sale of stock and a sale of the assets of a corporation. In general, a purchaser of the stock of a corporation receives a tax basis in the stock purchased equal in amount to the consideration paid for such stock. Other than this change in tax basis for the stock purchased, the sale of stock of a corporation generally does not trigger tax consequences either to the purchaser or to the corporation whose stock is sold. Accordingly, the existing tax attributes of the acquired cor-

poration generally remain intact even though the corporation is owned by different persons.

Carry Over of Tax Attributes

Given the treatment of stock purchase transactions under current law, if the proposed sale of Conrail stock occurred between private parties the tax atrributes of Conrail, such as its net operating loss carryforwards, investment tax credit carryforwards, and asset tax basis (including the so-called "frozen asset base"), would remain intact following the sale. The tax consequences of the proposed sale of Conrail to Norfolk would depart from this private transaction model in that certain of Conrail's tax attributes would not survive the sale transaction. Thus, pursuant to a closing agreement to be entered into between Conrail and the IRS, Conrail's net operating loss, investment tax credit and other carryforwards would, with certain exceptions, not be available for carryfoward to taxable years beginning after the date of sale (hereinafter, the "Closing").[1] At the same time, other Conrail tax attributes, in particular, Conrail's asset basis, would, as in a private party transaction, carry over to taxable years after the Closing.

We believe the different treatment of Conrail's tax carryforwards on the one hand and its asset basis on the other is appropriate for a number of reasons. Conrail's existing carryforwards arose during the period of the Federal government's ownership and are for the most part attributable to monies invested in Conrail by the Federal government. The same is not true of Conrail's asset basis. Altough the assets held by Conrail have changed substantially since its formation in 1976, data provided to us by the Department of Transportation indicates that the aggregate tax basis of its assets (as of December 31, 1983) is roughly equal to what it was at that time. Thus, the proposed transaction would return Conrail to the private sector with substantially the same asset basis as at the time the Federal government acquired it.[2]

We, of ocurse, recognize that the purchase price in a sale transaction will reflect the extent to which advantageous tax attributes carry over in an acquisition. Where the Federal government is the seller, however, any gain in purchase price from a carry over of favorable tax attributes must be weighed against future revenue losses attributable to the purchaser's utilization of the tax attributes. This weighing is more difficult to the extent the purchaser's ability to use the attributes is uncertain. In this respect, the value of Conrail's carryforwards is inherently more speculative than the value of its asset basis, since the carryforwards would be of future value only to the extent than annual depreciation deductions generated by Conrail's asset basis had already been fully utilized. It would thus appear reasonable for the Federal government to require the termination of Conrail's carryforwards rather than speculate as to their value, while, in accord with the model of a pri-

[1] The closing agreement would also provide that Conrail's taxable year would terminate as of the Closing.

[2] If the effects of inflation are accounted for, Conrail's curent asset basis is, of course, much less than at the time of its formation. Moreover, since the value of Conrail's assets today likely exceeds their value at the time of Conrail's formation, the built-in loss in its assets (i.e., the excess of their basis over value) is likely smaller today than it was at Conrail's formation.

vate transaction, permitting Conrrail to return to the private sector with aset basis intact.

It should also be noted that the treatment of Conrail's tax attributes in the proposed sale is similar to what was approved by Congress at the time of Conrail's formation. Thus, legislation adopted in connection with Conrail's formation, now reflected in section 374(c) of the Internal Revenue Code (the "Code"), provided that the net operating loss carryforwards of Conrail's predecessors would not carry over to Conrail whereas Conrail would inherit its predecessors' asset basis. The tax consequences of the proposed sale of Conrail would generally conform to that legislation precedent.

Finally, the carry over of Conrail's asset basis should not cause a reduction in Federal income tax revenues collected from Conrail. Although Conrail is a taxable entity, it has not previously paid Federal income tax, nor would it in the foreseeable future given its substantial carryforwards and the high basis in its assets. Because Conrail's carryforwards would not survive the proposed sale to Norfolk, the transaction would, if anything, accelerate the point at which Conrail would become a taxpaying corporation.

Utilization of Conrail Deductions by Norfolk

The proposed sale transaction could adversely affect Federal income tax revenues if future deductions generated by Conrail's asset basis could be utilized to offset otherwise taxable income of Norfolk. As an includible member in Norfolk's consolidated return, tax losses of Conrail could currently offset taxable income of any other member in the consolidated return unless such losses were limited under the separate return limitation year ("SRLY") and the built-in deduction rules of the consolidated return regulations. These rules, in general, prevent the utilization of an acquired corporation's pre-acquisition losses (including losses attributable to assets with tax basis in excess of fair market value, so-called "built-in deductions") against income of any member of the acquiring group. It is conceivable that Norfolk would seek to avoid these restrictions through any of the following strategies: by satisfying the so-called de minimis exception to the SRLY and built-in deduction rules, by transferring assets to Conrail, the income from which would be absorbed by Conrail losses, or by merging Conrail into Norfolk (or an affiliated corporation) in a transaction in which Conrail's tax attributes would carry over.

The consolidated return regulations would provide an exception to the SRLY and built-in deduction rules, if, on the acquisition date, the aggregate of the adjusted tax basis of all assets of Conrail (other than cash, marketable securities, and goodwill) do not exceed the fair market value of such assets by more than 15 percent. See Treas. Reg. § 1.1502-15(a)(4)(i)(*b*). A review of Conrail's tax data, provided to us by the Department of Transportation, suggests that Conrail would not satisfy the de minimis exception, since its aggregate tax basis appears to exceed $3 billion, and Norfolk is paying only $1.2 billion for 85 percent of Conrail's common stock. The de minimis exception, however, is based on the fair market value of Conrail's assets rather than the value of Conrail's stock. Since we do not have appraisals or other direct information concerning the

fail market value of Conrail's assets, it is not certain that Conrail would not satisfy the de minimis exception.[3]

Norfolk's ability to avoid the SRLY and built-in deduction rules by either transferring assets to Conrail or by merging Conrail into Norfolk or an affiliate would be constrained by Norfolk's contractual obligations, by practical business considerations and by the provisions of the tax law. Paragraph 12(b) (iii) of the Memorandum of Intent appears to prohibit a merger of Conrail into Norfolk (or an affiliated corporation) for at least five years after the Closing. In addition, it is questionable whether Norfolk would transfer significant income producing assets to Conrail given that, as reflected in Paragraph 12(b) of the Memorandum of Intent, there would be significant restrictions on Norfolk's ability to withdraw assets from Conrail. With regard to tax law limitations, a transfer of significant assests to Conrail or a merger of Conrail into Norfolk (or an affiliated corporation) could subject future use of Conrail deductions to challenge under section 269 of the Code See Treas. Reg. § 1.269–3(b)(1).

Warranty of Asset Basis

As provided in Paragraph 6(e) (ii) of the Memorandum of Intent, the Federal government would warrant to Norfolk that the asset basis reflected on Conrail's tax return for the year ending on the Closing would not be decreased as a result of an audit adjustment for a taxable year ending on or before the Closing. We believe this warranty is appropriate for a variety of reasons. Most importantly, the warranty protection extended to Norfolk is consistent with the allocation of risks that could be expected in an analogous private party transaction. Conrail has not been audited since its formation and its tax basis in many assets would have to be traced to its predecessors. As a consequence, Norfolk has no effective means of determining whether Conrail's asset basis is accurately reflected on its tax returns. In circumstances where the accuracy of the selling party's tax accounting cannot be established, it is reasonable to expect the seller to retain the risk of audit.

Consistent with the above warranty, Paragraph 6(e) (iii) and (iv) of the Memorandum of Intent require the Federal government to warrant that the adjusted tax basis of Conrail's assets would not be reduced and no gain or loss or income would be recognized by Conrail or Norfolk as a result of the sale of Conrail's stock to Norfolk, except in the event Norfolk makes, or is deemed to have made, an election under section 338 of the Code. If a section 338 election were made (or deemed made) by Norfolk in connection with its purchase of the stock of Conrail, Conrail would be treated as if it sold

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[3] Paragraph 12(e) of the Memorandum of Intent provides that as a condition to Norfolk buying Conrail from the Federal government, Norfolk shall have received (at the Federal government's sole election) either a ruling or a warranty that amounts paid to employees of Conrail for services rendered after Closing in order to increase their post-Closing wages to industry standard and the costs paid or incurred for certain routing concessions which are otherwise ordinary and necessary business expenses shall not be treated as built-in deductions and can be deducted when accrued or paid. Although the SRLY and built-in deduction rules apply to amounts economically accrued by not yet deducted, the above expenses do not appear to consititute built-in deductions. Because of the condition that such expenses must otherwise be ordinary and necessary business expenses, the ruling or warranty required by the above condition does not warrant the deductibility of such amounts; only that such amounts are not built-in deductions.

all of its assets to itself in a liquidating sale, and the tax basis of its assets would be adjusted to an amount based upon the amount Norfolk paid for Conrail's stock (grossed-up to reflect a purchase of 100 percent of Conrail's stock). The Memorandum of Intent further provides that, for purposes of the warranty, Norfolk would not be deemed to make a section 338 election as a result of any asset acquisition provided that Norfolk (and its affiliates) elect either to treat such assets acquired in accordacne with regulations promulgated under section 338 or elect under conditions to be agreed upon that the basis of such assets would not exceed the transferor's basis in the assets immediately before the acquisition. This warranty was provided because, as of the date the Memorandum of Intent was signed, the regulations providing for a carryover basis to avoid a deemed election under section 338, contemplated by Congress in the Tax Reform Act of 1984, had not been issued.

It should be noted that the warrrantly protection that Norfolk receives is not a guarantee that the IRS will not audit Conrail for pre-Closing years or that if it does so that it will not be entitled to require a reduction in Conrail's asset basis. In the event of an IRS audit and resultant reduction in basis, the warrantly procedure contemplated in the Memorandum of Intent and enabiling legislation entitles Conrail to sue in Federal court and to obtain a judgment which could be applied to offset any increase in tax liability attributable to the basis reduction. Although this procedure leaves Conrail economically protected from the risk of audit, it does not otherwise impair the IRS's ability to conduct an audit of Conrail. Retention of the IRS' audit authority with respect to Conrail's pre-Closing years could be significant to the extent substantive tax issue relating to those years have relevance to issues arising in other tax years of Conrail or to the administration of the Feeral income tax system generally.

Change in Methods Depreciation

The potential value of any built-in loss in Conrail's assets also depends on the period of time over which those assets would be depreciated. Teh warranty as to asset basis provided in Paragraph 6(e) (ii) of the Memorandum of Intent contains a condition that the depreciation of such assets should be determined without extra-ordinary departures from the methods of prior years. In general, since a depreciation method is considered a method of accounting, a taxpayer cannot change its method of depreciation with respect to a taxpayer cannot change its method of depreciation with respect to a particular asset without first obtaining permission from the Commissioner of the IRS.[4] In this regard, Conrail and Norfolk would be treated the same as any other taxpayer if, after the sale of Conrail, a change in depreciation method were requested.

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[4] Section 203(c) of the Economic Recovery Tax Act of 1981 permitted taxpayers to change their method of depreciating railroad track without having such change treated as a change in method of accounting. It does not appear that this provision applies to a change in the method of depreciating railroad track initiated after 1981. Thus, Conrail should not be able to change its present method of depreciating its "frozen asset base" without securing the prior approval of the IRS.

Carry Over Earnings & Profits

At present, Conrail may have a deficit earnings and profit account reflecting its substantial net losses over the period of its operation.[5] The Memorandum of Intent does not directly state whether the earnings and profits history of Conrail would carry over to post-Closing taxable years. Since earnings and profits ordinarily would carry over in a stock acquisition, the failure to state a contrary result suggests that Conrail's earnings and profits account would survive the transaction. Since earnings and profits are a measure of a corporation's income or loss, it would seem that Conrail's earnings and profits should be treated consistently with Conrail's net operating losses, and thus should not carry over to post-Closing years. We thus believe that a definitive sale agreement should clarify the treatment of Conrail's earnings and profits by providing that they not carry over in the sale transaction.

The value to Norfolk of a carryover of Conrail's earnings and profits is uncertain. Earnings and profits determine the extent to which a corporation's distributions to its shareholders are dividends rather than a return of capital. Although a deficit earnings and profits account would permit a corporation to make nontaxable return of capital distributions to its shareholders,[6] Conrail will be a wholly-owned member of Norfolk's consolidated group and thus its distributions will be nontaxable whether characterized as dividends or as a return of capital. We understand that Norfolk itself has a substantial surplus in its earnings and profits, and thus any distributions by Norfolk to its shareholders would be fully taxable dividends even if they were attributable to distributions from Conrail. Moreover, Norfolk's surplus in earnings and profits would not be offset by any deficit of Conrail even if Conrail were to merge with Norfolk. See section 381(c)(2) of the Code.

Cancellation of Conrail Debt and Preferred Stock

The Northeast Rail Service Act, which directed the Department of Transportation to devise a plan for the sale of Conrail, also directed that Conrail be sold free of the Federal government's existing debt or preferred stock interests. The apparent intent of the legislation was that Conrail be returned to the private sector with a sound capital structure. This intention is reflected in Paragraph 3 of the Memorandum of Intent, which provides that prior to the sale, approximately $850 million of outstanding Conrail debt, including accrued interest thereon, and approximately $2.3 billion par value of Conrail preferred stock, including accrued and unpaid dividends thereon, held by the Federal government would be "cancelled or retired, and contributed to the capital of Conrail." In addition, under Paragraph 6(e)(i) of the Memorandum of Intent, the Federal government would warrant that Conrail will not recognize

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[5] We have not been provided any data on Conrail's earnings and profits. There may be uncertainty as to the exact amount because of the uncertain effects of prior law.

[6] A carryover of any Conrail deficit in earnings and profits could well be disadvantageous to Norfolk, since it would limit Conrail's ability to issue new preferred stock to outside interests. The market for such preferred stock is predominantly among corporations, for whom dividend distributions are more advantageous than returns of capital.

income on account of the cancellation of Conrail preferred stock or debt.

Under general tax law principles, reflected in section 61(a)(12) of the Code, a corporation may recognize income where it retires outstanding indebtedness at a cost that is less than the fact amount of the indebtedness. This discharge of indebtedness principle recognizes that a taxpayer has an economic profit where it borrows money which it is not required to repay in full. Certain exceptions to the discharge of indebtedness principle are enumerated in section 108 of the Code, including that a corporation does not recognize income where a shareholder contributes indebtedness to the corporation's capital (provided that the shareholder's basis in the debt is not less than the face amount of the debt). This exception, stated in section 108(e)(6), effectively recognizes that any excess of the amount borrowed from a shareholder over the amount repaid might have been directly contributed to the corporation without causing the corporation to recognize income.

Under the substantive principles described above, Conrail would not recognize income from the cancellation of its debt if such cancellation were treated as a contribution to its capital by the Federal government. Although there is little authority addressing whether a shareholder's cancellation of corporate debt is a contribution to capital, characterization of the cancellation of Conrail's debt as a contribution to its capital would seem probable. The cancellation of Conrail's debt would be structured in this form, the cancellation was directed by Congress, and the practical effect of the cancellation would simply be to enhance the value of Conrail common stock owned or controlled by the Federal government.[7]

Even if the cancellation of Conrail's debt were not treated as a contribution to its capital by the Federal government, Conrail's carryforwards would remain available to offset any discharge of indebtedness income to Conrail for a pre-Closing year. Given the size of Conrail's carryforwards in comparison to the amount of its outstanding debt, the warranty that Conrail would not recognize discharge income offers additional protection to Conrail only to the extent such income might be recognized after the Closing, i.e., in a year in which the carryforwards would not be available to absorb the income. Although it may be conceivable that the debt cancellation and sale of Conrail could be recharacterized so as to cause Conrail to recognize discharge of indebtedness income after the Closing, any such income would as a practical matter be attributable to the period in which Conrail was owned by the Federal government. We thus believe it is consistent with the other tax consequences of the proposed sale that Conrail be held harmless from any tax liability arising from the cancellation of its indebtedness. A warranty providing for this result is additionally appropriate given that the cancelation is directed by legislation.

The proposed sale agreement also warrants that Conrail will not recognize income from the cancellation of its outstanding preferred stock. Under general tax law principles, a corporation does not rec-

[7] The Federal government owns approximately 85% of the common stock of Conrail, with the remaining 15% being held by Conrail Equity Corporation ("CEC"), a subsidiary of Conrail (see discussion below under Transactions Involving Conrail's ESOP).

ognize income upon a reacquisition or cancellation of its own stock. Thus, absent a recharacterization of the transaction, Conrail should not recognize income from the cancellation of its preferred stock.

Although we are uncertain as to why this warranty was requested, it might conceivably be out of a concern that Conrail's preferred stock could be characterized for tax purposes as indebtedness, and thus that Conrail may recognize income from its cancellation. There is little authority indicating under what circumstances an investment denominated as preferred stock could be recharacterized as debt for tax purposes. We nevertheless view the possibility of such recharacterization in Conrail's circumstances as remote. Recharacterization of any substantial portion of Conrail's preferred stock as debt could push Conrail near or into insolvency.

Transactions Involving Conrail's ESOP

Approximately 15 percent of Conrail's common stock is beneficially owned by Conrail's employee stock ownership plan ("ESOP").[8] Paragraph 2 of the Memorandum of Intent provides that, at or prior to the Closing, Norfolk or Conrail shall have made appropriate arrangements with respect to the employees of Conrail to accomplish the acquisition by Norfolk of such employees' 15 percent beneficial interest in Conrail. While we understand that separate negotiations between Norfolk and Conrail's employees are still pending, Exhibit A to the Memorandum of Intent indicates that Norfolk proposes to transfer $375 million in cash or Norfolk common stock to Conrail's ESOP.

To the extent that Norfolk's transfer to Conrail's ESOP is in exchange for the ESOP's beneficial interest in Conrail's stock, such amounts would not be deductible contributions by Norfolk but rather costs incurred in acquiring Conrail's stock. On the other hand, to the extent that the amount of Norfolk's transfer to Conrail's ESOP exceeds the value of the ESOP's beneficial interest in Conrail's stock, such amount could be a deductible contribution by Norfolk, subject to the deduction timing rules of Code section 404 (including section 404(j)) and the continued qualification of Conrail's ESOP. The enabling legislation specifically provides that no inference is to be drawn from the provisions of that legislation regarding either the allocation of Norfolk's $375 million transfer between the purchase of Conrail's stock and deductible contributions to the ESOP or the deductibility of any portion of such transfer by Norfolk to Conrail's ESOP.

If the form of Norfolk's arrangements with Conrail's employees were to cause disqualification of Conrail's ESOP, such employees generally would be currently taxable on the value of their benefi-

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[8] CEC, all of the common stock and approximately 50 percent of the preferred stock of which is owned by Conrail, currently owns approximately 15 percent of the common stock of Conrail. The other 50 percent of CEC's preferred stock is owned by Conrail's ESOP. Under existing agreements, Conrail's ESOP by 1991 would own 100 percent of CEC's preferred stock which would then be exchanged for the 15 percent of Conrail's common stock held by CEC. It should be noted that under Paragraph 12(b)(viii) of the Memorandum of Intent Norfolk and Conrail are prohibited for at least five years from obtaining a reversion of any excess assets held in connection with Conrail's Supplemental Pension Plan. A reversion of plan assets to either Norfolk or Conrail would not be permissible unless and until the plan is terminated and all liabilities of the plan to the employees are fully satisfied.

cial interest in the trust. In this regard, section 132 of the enabling legislation provides that Conrail's ESOP and related trusts maintained, amended, or adopted in implementing the Secretary of Transporation's plan for the sale of Conrail shall be deemed to meet the qualification requirements of sections 401 and 501, notwithstanding that such plans may not meet the requirements of Code section 415 (which relate to limitations on contributions and other additions with respect to participants in a qualified plan) or that participants in such plans may be entitled to withdraw a portion of the shares allocated to their accounts prior to the expiration of the two-year period generally imposted by the IRS for qualified plans (see Treas. Regs. § 1.401-1(b)(1)(ii)). Although Norfolk's arrangements with Conrail's employees have not been finalized, we believe it appropriate, given the possibly unique form of such arrangements and the unusual structure of Conrail's ESOP, to waive by legislation these two possible technical violations in order that Conrail's ESOP maintain its qualification.

Sincerely,

RONALD A. PEARLMAN,
Assistant Secretary (Tax Policy).

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new material is printed in italic, existing law in which no change is proposed is shown in roman):

THE REGIONAL RAIL REORGANIZATION ACT OF 1973

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Section 102 of that Act

DEFINITIONS

SEC. 102. As used in this Act, unless the context otherwise requires—

(1)–(5) * * *

(6) "Definitive Agreements" means any and all agreement existing or to be developed between the United States and Norfolk Southern Corporation, including all representations and warranties made therein, to implement the Memorandum of Intent described in paragraph (20)(A);

[(6)] *(7)* "effective date of the final system plan" means the date on which the final system plan or any revised final system plan is deemed approved by Congress, in accordance with section 208 of this Act;

[(7)] *(8)* "employee stock ownership plan" means a technique of corporate finance that uses a stock bonus trust or a company stock money purchase pension trust which qualifies under section 401(a) of the Internal Revenue Code of 1954 (26 U.S.C. § 401(a)) in connection with the financing of corporate improvements, transfers in the ownership of corporate assets, and other capital requirements of a corporation and which is designed to build beneficial equity ownership of shares in the employer corporation into its employees substantially in proportion to their relative incomes, without requiring any cash outlay, any reduction in pay or other employee benefits, or the surrender of any other rights on the part of such employees.

[(8)] *(9)* "final system plan" means the plan of reorganization for the restructure, rehabilitation, and modernization of railroads in reorganization prepared pursuant to section 206 and approved pursuant to section 208 of this Act;

[(9)] *(10)* "Finance Committee" means the Finance Committee of the Board of Directors of the Association established under section 201(i) of this Act;

[(10)] *(11)* "includes" and variants thereof should be read as if the phrase "but is not limited to" were also set forth;

[(11)] *(12)* "local or regional transportation authority" includes a political subdivision of a State;

[(12)] *(13)* "Office" means the Rail Services Planning Office established under section 205 of this Act;

[(13)] *(14)* "profitable railroad" means a railroad which is not a railroad in reorganization. The term does not include the Corporation, the National Railroad Passenger Corporation, or a railroad leased, operated, or controlled by a railroad in reorganization in the region;

[(14)] *(15)* "rail properties" means assets or rights owned, leased, or otherwise controlled by a railroad (or a person owned, leased, or otherwise controlled by a railroad) which are used or useful in rail transportation service; except that the term, when used in conjunction with the phrase "railroads leased, operated, or controlled by a railroad in reorganization", shall not include assets or rights owned, leased, or otherwise controlled by a Class I railroad which is not wholly owned, operated, or leased by a railroad in reorganization but is controlled by a railroad in reorganization;

[(15)] *(16)* "railroad" means a common carrier by railroad as defined in section 1(3) of part I of the Interstate Commerce Act (49 U.S.C. 1(3)). The term includes the Corporation and the National Railroad Passenger Corporation;

[(16)] *(17)* "railroad in reorganization" means a railroad which is subject to a bankruptcy proceeding and which has not been determined by a court to be reorganizable or not subject to reorganization pursuant to this Act as prescribed in section 207(b) of this Act. A "bankruptcy proceeding" includes a proceeding pursuant to section 77 of the Bankruptcy Act (11

U.S.C. 205) and an equity receivership or equivalent proceeding;

[(17)] *(18)* "Region" means the States of Maine, New Hampshire, Vermont, Massachusetts, Connecticut, Rhode Island, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, West Virginia, Ohio, Indiana, Michigan, and Illinois; the District of Columbia; and those portions of contiguous States in which are located rail properties owned or operated by railroads doing business primarily in the aforementioned jurisdictions (as determined by the Commission by order);

[(18)] *(19)* "Secretary" means the Secretary of Transportation or the designated representative of the Secretary;

(20) "Secretary's Plan" means (A) the Memorandum of Intent between the United States and Norfolk Southern Corporation signed February 8, 1985, and (B) the divestitures by the Norfolk Southern Corporation of certain rail tracks, rights, and facilities, and any transactions or agreements related or incidental to such divestitures, in connection with the implementation of attachment A to the letter from the Department of Justice attached to the Memorandum of Intent as exhibit E;

[(19)] *(21)* "State" means any State or the District of Columbia;

[(20)] *(22)* "subsidiary" means any corporation 100 percent of whose total combined voting shares are, directly or indirectly, owned or controlled by the Corporation;

[(21)] *(23)* "supplemental transaction" means any transaction set forth in a proposal under section 305 of this Act under section 303(b) of this Act, under which the Corporation or a subsidiary thereof would (A) acquire rail properties not designated for transfer or conveyance to it under the final system plan, (B) convey rail properties to a profitable railroad, a subsidiary of the Corporation or, other than as designated in the final system plan, to the National Railroad Passenger Corporation or to a State or a local or regional transportation authority, or to any other responsible person for use in providing rail service, or (C) enter into contractual or other arrangements with any person for the joint use of rail properties or the coordination or separation of rail operations or services.

Section 214 of that Act

AUTHORIZATION FOR APPROPRIATIONS

SEC. 214. [(a) SECRETARY.—There are authorized to be appropriated to the Secretary for purposes of preparing the reports and exercising other functions to be performed by him under this Act such sums as are necessary, not to exceed $12,500,000, to remain available until expended. There are authorized to be appropriated to the Secretary such sums as may be necessary to discharge the obligations of the United States arising under section 303(c)(5) of this Act.

[(b) OFFICE.—There are authorized to be appropriated to the Commission for the use of the Office in carrying out its functions under this Act such sums as are necessary, not to exceed

$7,000,000, to remain available until expended. The budget for the Office shall be submitted by the Commission directly to the Congress and shall not be subject to review of any kind by any other agency or official of the United States. Moneys appropriated for the Office shall not be withheld by any agency or official of the United States or used by the Commission for any purpose other than the use of the Office. No part of any other moneys appropriated to the Commission shall be withheld by any other agency or official of the United States to offset any moneys appropriated pursuant to this subsection.

[(c) ASSOCIATION.—] There are authorized to be appropriated to the Association for purposes of carrying out its administrative expenses under this Act not to exceed $13,000,000 for the fiscal year ending September 30, 1982, and not to exceed $4,000,000 for the fiscal year ending September 30, 1983. Sums appropriated under this subsection are authorized to remain available until expended.

Section 216 of that Act

DEBENTURES AND SERIES A PREFERRED STOCK

SEC. 216. (a) * * *

(b)(1) - (4) * * *

(5) The authority of the Association to purchase debentures or series A preferred stock of the Corporation under this section shall terminate upon the consummation of the sale of the interest of the United States in the common sock of the Corporation under the terms of the Secretary's Plan.

(c) - (e) * * *

(f)(1) - (7) * * *

(8)(A) Except as provided in subparagraph (B) of this paragraph, no person described in subparagraph (C) of this paragraph shall have or be subject to any fiduciary responsibility, obligation, or duty, nor shall any such person be subject to civil liability, under any Federal or State law, as a fiduciary or otherwise—

(i) in connection with the employee stock ownership plan and related trust established by the Corporation pursuant to the requirements of this subsection or with ConRail Equity Corporation (I) on account of any reorganization or restructuring of the Corporation, it successors or assigns, or their assets or capital structure, or (II) on account of any action taken or not taken by the Corporation which may affect its ability to attain the performance levels established in connection with the plan pursuant to paragraph (2)(A)(ii) of this subsection;

(ii) for or in connection with the establishment, continuation or implementation of the plan and related trust or of ConRail Equity Corporation or the acquisition of, investment in or retention of any security of the Corporation or ConRail Equity Corporation, or of any of their successors and assigns, by the plan or ConRail Equity Corporation, or the disposition of any such security to the extent that such disposition is made in connection with a reorganization or restucturing of the Corporation, its successors and assigns, or their assets cr capital structure, as directed or approved by or on behalf of the Asso-

ciation or the United States, or the aquisition or retention of any cash, security or other property received in connection with any such reorganization or restructuring; [or]

(iii) for or in connection with any other action taken or not taken pursuant to any term or condition of the plan or related trust agreement or of the articles of incorporation or bylaws of ConRail Equity Corporation[.]; *or*

(iv) for or in connection with any action taken to implement the Secretary's Plan, including any sale, exchange, valuation, or disposition of the plan and related trust assets, or the assets of ConRail Equity Corporation, in connection with implementation of the Secretary's Plan and any determiniation of the terms on which any such sale, exchange, valuation, or disposition is effected.

Any directions described in clauses (i)(I), (ii), or (iii) shall be taken at the direction, or with the consent, of the Association or of the Secretary or his designate.

(B)–(D) * * *

(9)–(10) * * *

(11) The employee stock ownership plans of the Corporation and related trusts maintained, amended, or adopted in implementing the Secretary's Plan shall be deemed to meet the qualification requirements of sections 401 and 501, respectively, of the Internal Revenue Code of 1954, notwithstanding (A) that such plans may not meet the requirements of section 415 of the Internal Revenue Code of 1954, or (B) that participants in such plans may be entitled to withdraw a portion of the shares allocated to their accounts prior to the expiration of the period generally imposed by the Internal Revenue Service for qualified plans. Such qualification shall relate only to the contributions, allocations, and withdrawals of shares provided for in the Secretary's Plan with respect to the plans and related trusts maintained, amended, or adopted in implementing the Secretary's Plan. Such contributions and allocations shall in no event be treated as having exceeded the maximum annual addition permitted under section 415 of the Internal Revenue Code of 1954 (but not for purposes of applying section 404(j) of the Internal Revenue Code of 1954) for purposes of calculating any limitation under section 415 with respect to contributions and allocations not described in the Secretary's Plan, including contributions and allocations to plans and related trusts of the Corporation and any affiliated corporation. The continued qualification of such plans with respect to all other contributions, allocations, and withdrawals shall be subject to all provisions of existing law, as amended from time to time. No inference shall be drawn from this paragraph as to whether an amount is a contribution deductible under section 404 of the Internal Revenue Code of 1954 rather than a non-deductible capital expenditure.

(12) Except as provided in section 1152 of the Northeast Rail Service Act of 1981 (45 U.S.C. 1105), the issuance and sale or contribution of securities by Norfolk Southern Corporation to fulfill arrangements with the Corporation's employees in implementing the Secretary's Plan and the distribution of shares from the Corporation's employee stock ownership plans and related trusts maintained, amended, or adopted in implementing the Secretary's Plan shall not be subject to the registration and prospectus delivery requirements of

the Securities Act of 1933, any approval requirement under subtitle IV of title 49, United States Code, or the laws of any State with respect to the issuance and sale of securities.

(g) * * *

Section 217 of that Act

ADDITIONAL PURCHASES OF SERIES A PREFERRED STOCK

SEC. 217. (a)-(e) * * *

[(f) AUTHORIZATION OF APPROPRIATIONS.—(1) There is authorized to be appropriated not to exceed $262,000,000—

[(A) of which not to exceed $137,000,000 shall be appropriated to the Association for purposes of purchasing securities and accounts receivable of the Corporation under this section, such sums to remain available until the Secretary transfers the Corporation under title IV of this Act;

[(B) of which not to exceed $75,000,000 shall be appropriated to the Secretary, to facilitate the transfer of rail commuter services from the Corporation to other operators, for distribution under the statutory provisions of section 1139(b) of the Northeast Rail Service Act of 1981;

[(C) of which not to exceed $35,000,000 shall be appropriated to the Secretary to be allocated for employee protection under section 106 of the Rock Island Railroad Transition and Employee Assistance Act (45 U.S.C. 1005); and

[(D) of which not to exceed $15,000,000 shall be appropriated to the Secretary to facilitate the transfer of rail commuter services from railroads that entered reorganization after calendar year 1974 to any commuter authority that was providing commuter service, operated by a railroad that entered reorganization after calendar year 1974, as of January 1, 1979.

[(2) All sums received on account of the holding or disposition of any securities or accounts receivable referred to in paragraph (1)(A) of this subsection shall be deposited in the general fund of the Treasury.

[(3) The amount authorized to be appropriated under paragraph (1)(B) of this subsection shall be reduced, in an amount equal to any amounts reappropriated under the authority of section 216(g)(2) of this Act, upon the date of enactment of any Act which reappropriates such amounts.]

Section 301 of that Act

FORMATION AND STRUCTURE

SEC. 301. (a)-(h) * * *

(i) LIABILITY OF DIRECTORS.—No director of the Corporation shall be liable, for money damages or otherwise, to any party by reason of the fact that such person is or was a director, if, with respect to the subject matter of the action, suit, or proceeding, such person was fulfilling a duty which he in good faith reasonably believed to be required by law, *taken to implement the Secretary's Plan,* or vested in him in his capacity as a director of the Association or as an officer of the United States. The United States shall indemnify

such person against all judgments, amounts paid in settlement, and costs and expenses (including fees of accountants, experts, and attorneys), actually and reasonably incurred in connection with any such action, suit, or proceeding in which such person is determined to have met such standard of conduct. This subsection shall not be construed to grant any immunity from any criminal law of the United States.

(j) * * *

(k) GOVERNING PROVISIONS AFTER SALE.—The provisions of this Act shall not apply to the Corporation and to activities and other actions and responsibilities of the Corporation and its directors after consummation of the sale of the interest of the United States in the common stock of the Corporation under the terms of the Conrail Sale Amendments Act of 1985, other than with regard to—

(1) section 102 of this Act;

(2) section 201(d) of this Act;

(3) section 203 of this Act, but only with respect to information relating to proceedings before the special court established under section 209(b);

(4) section 216(f)(8) of this Act, but only as such authority applies to activities related to the employee stock ownership plan and related trusts prior to or in connection with consummation of the sale of the interest of the United States in the common stock of the Corporation, including activities related to the sale, exchange, valuation, or disposition of the assets of the employee stock ownership plan and related trusts, or of Conrail Equity Corporation, in connection with the Secretary's Plan;

(5) sections 216(f)(11) and 216(f)(12) of this Act, as amended by the Conrail Sale Amendments Act of 1985;

(6) section 217(e) of this Act;

(7) subsection (i) of this section, but only as such authority applies to service as a director of the Corporation prior to consummation or in connection with implementation of the sale of the interest of the United States in the common stock of the Corporation;

(8) section 305 of this Act, but only as to the effect, and continuing administration, of supplemental transactions consummated prior to consummation of the sale of the interest of the United States in the common stock of the Corporation;

(9) section 308 of this Act, but only in abandonment actions when such authority has been relied on to file a notice or notices of insufficient revenues prior to consummation of the sale of the interest of the United States in the common stock of the Corporation;

(10) section 401(a) of this Act, as amended by the Conrail Sale Amendments Act of 1985;

(11) section 402 of this Act, as amended by the Conrail Sale Amendments Act of 1985;

(2) section 408(c) of this Act, as amended by the Conrail Sale Amendments Act of 1985;

(13) section 701 of this Act, but only as may be necessary to identify employees eligible for benefits under agreements entered into under such section;

(14) section 702(e) of this Act;

(15) section 704(b) of this Act;
(16) section 709 of this Act;
(17) section 710(b)(1) of this Act;
(18) section 711 of this Act;
(19) section 714 of this Act, but only with regard to disputes or controversies specified in such section that arose prior to consummation of the sale of the interest of the United States in the common stock of the Corporation; and
(20) section 715 of this Act, as amended by the Conrail Sale Amendments Act of 1985.

Section 401 of that Act

INTEREST OF UNITED STATES

SEC. 401. (a)(1)–(2) * * *

[(3) Any plan submitted under paragraph (2) shall be deemed approved at the end of the 60-calendar-day period of continuous session of the Congress beginning on the date the plan was submitted, unless during such period both Houses of Congress pass a concurrent resolution the substance of which states that the Congress does not favor such plan. The Secretary shall implement any plan deemed approved under this paragraph. For purposes of this subsection—

[(A) continuity of session of the Congress is broken only by an adjournment sine die; and

[(B) the days on which either House is not in session because of adjournment of more than 3 days to a day certain are excluded in the computation of the 60-day period.]

(3) The Secretary is authorized and directed to implement the Secretary's Plan, in accordance with paragraph (4) of this subsection. Such implementation of the Secretary's Plan and the coordinated operation of the Corporation's properties with those of Norfolk Southern Corporation and its affiliates as a single rail system is deemed approved by the Commission under chapter 113 of title 49, United States Code.

(4) The Secretary shall implement the Secretary's Plan by negotiating, executing, delivering, and performing the Definitive Agreements, which shall conform to the Memorandum of Intent described in section 102(20)(A) of this Act. The Secretary shall, 45 calendar days before the date on which the Secretary anticipates that the interest of the United States in the common stock of the Corporation will be sold to Norfolk Southern Corporation, transmit to the Committee on Commerce, Science, and Transportation of the Senate and to the Committee on Energy and Commerce of the House of Representatives a notification of any alteration from the Memorandum of Intent described in section 102(20)(A) of this Act which will be made in the Definitive Agreements. After the date of such sale, the Secretary shall transmit to such Committees notification of any intent to waive compliance with any substantive covenant, agreement or obligation contained in the Definitive Agreements, and the Secretary may not waive such compliance until a period of 45 calendar days has expired after the date of such transmittal.

(5) The Secretary shall not transfer the interest of the United States in the common stock of the Corporation except concurrently with a divestiture by Norfolk Southern Corporation of rail assets and rights approved by the Attorney General.

(6) The sale of the interest of the United States in the common stock of the Corporation shall be deemed to be consummated at the date title to the common stock passes to Norfolk Southern Corporation and the United States receives the cash purchase price.

(b)-(c) * * *

[(d) RAILROAD PURCHASES.—Any railroad which purchases common stock of the Corporation shall vote such stock in the same proportion as all other common stock of the Corporation is voted unless the Commission determines that such railroad has purchased a controlling interest in the Corporation.

[(e) STOCK OFFERING.—In making any sale under a plan submitted under subsection (a)(2), the Secretary shall first offer for sale, to any employees whose wages are reduced pursuant to any agreement entered into in accordance with the goal set forth in section 1134(4) of the Northeast Rail Service Act of 1981, stock in amounts equal to the extent of such wage reduction.]

Section 402 of that Act

[DEBT AND PREFERRED STOCK

[SEC. 402. (a) LIMITATION.—Prior to any sale of the common stock of the Corporation under section 401, the interest of the United States in any debt or preferred stock of the Corporation held by the United States (or any agent or instrumentality thereof, including the Association) shall be limited to any interest which attaches to such debt or preferred stock in the event of bankruptcy, or substantial sale, or liquidation of the assets of the Corporation. The Secretary shall substitute for the evidence of such debt or preferred stock held by the United States (or any such agent or instrumentality) contingency notes conforming to the limited terms set forth in this subsection.

[(b) SUBSEQUENT ISSUE.—If the interest of the United States is limited under subsection (a) the Corporation may issue new debt or preferred stock subsequent to the issuance of the debt or preferred stock described in subsection (a) which shall have higher priority in the event of bankruptcy, liquidation, or abandonment of the assets of the Corporation than the debt or preferred stock described in subsection (a).]

DEBT AND PREFERRED STOCK

SEC. 402. (a) RECAPITALIZATION.—In connection with the sale of the interest of the United States in the common stock of the Corporation under section 401 of this Act, and consistent with the Secretary's Plan, the Secretary may take all action necessary to cause the Corporation to be recapitalized such that the interest of the United States, or any agent or instrumentality thereof, and all other commitments or obligations of the Corporation to the United States or any agent or instrumentality thereof arising out of such interest, in any debt (including accrued interest and contingent interest thereon)

and preferred stock (including accrued and unpaid dividends thereon) of the Corporation shall be cancelled or retired, and contributed to the capital of the Corporation. The Secretary shall cause the recapitalization authorized by this section to be effective as of the consummation of the sale of the interest of the United States in the common stock of the Corporation.

(b) BREACH OF REPRESENTATIONS.—(1) Norfolk Southern Corporation or any successor corporation thereto may bring suit for any breach of representations contained in paragraph 6(e) of the Memorandum of Intent described in section 102(20)(A) of this Act (hereinafter referred to as the "Representations") in the United States Claims Court or a district court of the United States. If such an action is brought, the Claims Court or district court shall determine the amount by which the United States income tax (including interest and penalties whether or not such penalties are assessed as a tax under the Internal Revenue Code of 1954) assessable against the Corporation or against Norfolk Southern Corporation for any year exceeds the amount of such tax which would have been assessable for such year had such Representations not been breached (hereinafter referred to as the "Offset Amount").

(2) The Representations shall be considered breached and Norfolk Southern Corporation shall be entitled to bring suit upon the first occurrence of any of the following that is inconsistent with the Representations: (A) the issuance by the Internal Revenue Service of a statutory notice of deficiency (90-day letter), (B) the assessment of the United States income tax, or (C) any claim by the United States in a suit or other judicial proceeding against Norfolk Sourthern Corporation or the Corporation.

(3) The right to bring suit pursuant to this section shall not be subject to any waiting period applicable to tax proceedings or to any requirements for payment of any tax as a condition to instituting any suit based on a breach of the Representations.

(4) Any judgment for money damages relating to breach of the Representations shall only be awarded as an offset in any court or administrative proceeding against the tax liability of Norfolk Southern Corporation or the Corporation, or both, to which such breach relates; except that if any such tax liability resulting from such breach has been paid, the judgment shall to that extent be an offset against any United States income tax liability of the Norfolk Southern Corporation or the Corporation, or both. If any portion of the tax resulting from a breach of the Representations has been paid, then the Offset Amount shall include interest on such payment from the date paid at the rate from time to time specified in the Internal Revenue Code of 1954 for interest payable on refund claims.

(5) It shall not be a defense to an action brought under this section that Norfolk Southern Corporation knew, or should have known, of the falsity of the Representations or that there exists no carryover basis procedure as contemplated by the last sentence of the Representations.

(6) For purposes of this section, tax liability of Norfolk Southern Corporation shall include the tax liability of Norfolk Southern Corporation and its affiliated group, within the meaning of section 1504 of the Internal Revenue Code of 1954.

Section 404 of that Act

[FAILURE TO SELL AS ENTITY

[SEC. 404. (a) NOTIFICATION.—After June 1, 1984, the Secretary may notify the USRA Board that he has determined that he is unable to sell the interest of the United States in the common stock of the Corporation under section 401 of this Act. The USRA Board shall approve or disapprove such determination within 15 days after the date of such notification.

[(b) USRA BOARD APPROVAL.—(1) If the USRA Board approves any determination of the Secretary of which it is notified under subsection (a)(2), the employees of the Corporation may, within 90 days after the date of the Secretary's determination was submitted to the USRA Board, submit to the Secretary a plan for the purchase of the common stock of the Corporation.

[(2) The Secretary shall approve any plan submitted under paragraph (1) of this subsection if, taking into account any consideration to be received by the Corporation from any sale of debt instruments or newly issued common stock as part of the purchase transaction, the Corporation's earnings and earnings prospects are sufficient to meet its operating and capital requirements and permit it adequate access to the private capital markets for any additional capital it may require, so that the Corporation will not require further Federal financial assistance. The Secretary shall consider whether the plan ensures continued rail service and maximizes the return to the United States on its investment.

[(3) If the Secretary does not approve the plan submitted under paragraph (1) of this subsection the Secretary shall initiate discussions and negotiations under section 405 of this Act for the transfer of the Corporation's freight rail properties and service responsibilities.

[(c) USRA BOARD DISAPPROVAL.—(1) If the USRA Board disapproves any determination of the Secretary it is notified of under subsection (a), the Secretary shall continue to attempt to sell the interest of the United States in the common stock of the Corporation.

[(2) The Secretary may notify the USRA Board that he has determined that he is unable to sell the interest of the United States in the common stock of the Corporation each 90 days thereafter, and such determination shall be subject to the approval or disapproval under the provisions of this section.]

Section 405 of that Act

[TRANSFER PLAN

[Sec. 405. (a) INITIAL DISCUSSIONS.—If the Corporation is determined not to be a profitable carrier by the USRA Board under subsection (a) or (b) of section 403, or if any plan for the purchase of the common stock of the Corporation under section 404(b) is not approved by the Secretary, or if at any time the Corporation requires funding from the Federal Government in excess of amounts authorized on or before the effective date of the Northeast Rail Service Act of 1981, the Secretary, in consultation with the Corporation,

shall initiate discussions and negotiations under section 5 of the Department of Transportation Act (49 U.S.C. 1654) with potential purchasers for the transfer of the Corporation's freight rail properties and service responsibilities, specifically including freight terminal operations in the Northeast Corridor.

[(b) CONFERENCES.—As a part of the forth in subsection (a), the Secretary shall consult with railroads, representatives of employees of the Corporation and other railroads that may be affected, appropriate State and local government officials, shippers, consumer representatives, potential purchasers or operators other than railroads, and holders of purchase money equipment obligations. The Secretary shall hold conferences in developing plans for the sale of the Corporation and persons attending or represented at such conferences shall not be liable under the antitrust laws of the United States with respect to any discussion at such conference, or with respect to any agreements reached at such conferences, which are entered into with the approval of the Secretary.

[(c) FREIGHT TRANSFER AGREEMENTS.—Any agreement for the transfer of the Corporation's rail properties and service responsibilities (hereafter in this title referred to as "freight transfer agreements") shall specify the rail properties and the service responsibilities to be transferred to the acquiring railroad and the price to be paid for rail properties transferred, and shall include such other terms as the Secretary, consulting with the Corporation, and the acquiring railroad consider appropriate.

[(d) TERMINAL COMPANIES.—Not later than 1 year after the freight transfer agreements are implemented pursuant to section 408 of this title, the Secretary shall arrange for the formation by railroads of one or more terminal companies, to be operated as private corporations without Federal operating subsidy, to provide switching and terminal services in the Northeast Corridor without preference to the traffic of any railroad. Notwithstanding the provisions of the preceding sentence, the Secretary shall not be required to arrange for the formation of such terminal companies if he certifies in writing to the Congress that individual acquiring railroads are capable of assuring adequate freight terminal operations in the Northeast Corridor.

[(e) COMPETITION.—Discussion and negotiations for freight transfer agreements shall be conducted, to the maximum extent practicable, to assure the preservation and enhancement of rail competition in the Northeast. In the development of freight transfer agreements, rail lines which have heavy rail freight activity shall receive priority designation for competitive service. In determining such priority the Secretary shall consider shipper input and other relevant data.

[(f) REPORT.—The Secretary shall submit to the Congress every six months a report regarding his activities under this section. If the Secretary finds that he is unable to sell the interest of the United States in the common stock of the Corporation under section 401 of this Act, he shall concurrently notify the Congress and the USRA Board of such finding.]

Section 406 of that Act

[CONSOLIDATION OF AGREEMENTS

[SEC. 406. (a) GOALS.—The Secretary shall ensure that freight transfer agreements entered into under the authority of this title provide for the continuation of the optimum level of self-sustaining rail service consistent with the needs of the service area, the long-term viability of acquiring railroads operating in the private sector, the preservation and enhancement of transportation competition, and the orderly disposition of equipment subject to railroad equipment obligations and of rail properties subject to contractual obligations based on improvements directly financed by States, localities, and shippers.

[(b) TRANSFER DATE.—All freight transfer agreements entered into under this title shall include as a term a common transfer date.

[(c) CONSOLIDATION.—The Secretary shall consolidate, for purposes of approval and review, all freight transfer agreements and shall ensure that no less than 75 percent of the total rail service operated by the Corporation on the date of transfer shall be maintained under the aggregate of such agreements. If the Secretary acts to grant preliminary or final approval to the freight transfer agreements, the Secretary shall include in his determination a listing of those rail properties not specified in such agreements for transfer, and the likely disposition of such properties.]

Section 407 of that Act

[PUBLIC COMMENT AND CONGRESSIONAL NOTIFICATION

[SEC. 407. (a) ATTORNEY GENERAL.—If the Secretary grants preliminary approval to the freight transfer agreements, the Secretary shall publish a summary of the agreements in the Federal Register, requesting public comment. The period for comment shall be not less than 30 days. The Secretary shall, upon the expiration of such 30-day period, transmit the freight transfer agreements with any proposed modifications to the Attorney General. The Attorney General shall, within 10 days of receipt of such transmittal, advise the Secretary as to whether any freight transfer agreement or combination of agreements would create or maintain a situation inconsistent with the antitrust laws of the United States, and the Secretary shall give due consideration to any such advice that may be rendered. The transmittal to the Attorney General shall contain such information as the Attorney General may require in order to advise the Secretary as to whether the freight transfer agreements under consideration would create or maintain a situation inconsistent with such antitrust laws.

[(b) COMMISSION.—The Secretary shall also transmit the freight transfer agreements with any proposed modifications to the Commission on the same date that the Secretary transmits them to the Attorney General. The Commission shall, within 10 days of receipt of such transmittal, advise the Secretary as to the effect of any freight transfer agreement or combination of agreements on the adequacy of public transportation and whether any freight transfer

agreement or combination of agreements would have an adverse effect on other railroads or on competition among railroads.

[(c) FINAL APPROVAL.—After consideration of comments received and any advice rendered by the Attorney General and the Commission, but no later than 90 days after the close of public comment under subsection (a), the Secretary may grant final approval to the freight transfer agreements. With the consent of the acquiring railroad, the Secretary may modify a freight transfer agreement prior to granting such final approval.

[(d) CONGRESSIONAL REVIEW.—If the Secretary grants final approval to the freight transfer agreements, the Secretary shall, within 10 days of such approval, transmit a copy of such agreements to each House of Congress, together with the Secretary's determination of final approval. The freight transfer agreements shall be deemed approved at the end of 60 calendar days of continuous session of the Congress, unless either the House of Representatives or the Senate or both passes a resolution during such period stating that they do not favor the freight transfer agreements. For purposes of this subsection—

[(1) continuity of session of the Congress is broken only by an adjournment sine die; and

[(2) the days on which either House is not in session because of adjournment of more than 3 days to a day certain are excluded in the computation of the period described in this subsection.]

Section 408 of that Act

PERFORMANCE UNDER AGREEMENTS; EFFECT

SEC. 408. [(a) TRANSFER.—If neither House of Congress has acted to disapprove the freight transfer agreements within 60 days, rail properties shall be conveyed and service responsibilities of the Corporation shall be transferred in accordance with the freight transfer agreements. Such conveyances and transfers shall not be subject to the provisions of subtitle IV of title 49, United States Code, or, with respect to the issuance and sale of securities to the United States or the Corporation for the purpose of financing such transfers, to the registration and prospectus delivery requirements of the Securities Act of 1933, or to the laws of any State with respect to the issuance and sale of securities.]

[(b) RESPONSIBILITIES.—On the date the common stock or the rail properties and service responsibilities of the Corporation are transferred under this title—

[(1) the acquiring railroad shall be deemed a railroad subject to subtitle IV of title 49, United States Code, and shall be deemed qualified thereunder to provide the service responsibilities assumed; and

[(2) the Corporation shall discontinue and shall be relieved of any responsibility to operate rail service over any line of railroad conveyed under the freight transfer agreements and all other rail properties of the Corporation.]

(c) REVIEW.—[No transfer of the Corporation's stock or rail properties and freight service responsibilities under this title *The issu-*

ance in private placement of notes or other securities in accordance with exhibit B to the Memorandum of Intent (described in section 102(20)(A) of this Act) in the Secretary's Plan shall not be subject to the provisions of subtitle IV of title 49, United States Code. shall be subject to] *Except as provided in section 1152 of the Northeast Rail Service Act of 1981 (45 U.S.C. 1105), the Secretary's Plan and the Definitive Agreements and their negotiation, execution, and implementation shall not be subject to administrative or* judicial review or to review by the Commission.

[(d) SALE DATE.—Unless the Corporation is found not profitable under section 403(a) or (b) of this title, the Secretary may not sell the rail properties and service responsibilities of the Corporation until June 1, 1984, except that if the Corporation requires further Federal financing before such date, such sale may be made before such date.]

Section 409 of that Act

[ASSIGNMENT

[SEC. 409. (a) LIABILITY.—Notwithstanding any other provision of this title, if an interest in rail properties is conveyed pursuant to section 408 of this Act, and if such conveyance is in accordance with the requirements of subsection (b) of this section, the conveyance of such properties shall be deemed an assignment. Any such assignment shall relieve the Corporation of liability for any breach which occurs after the date of such conveyance, except that the Corporation shall remain liable for any breach, event of default, or violation of covenant which occurred (and any charges or obligations which accrued) prior to the date of such conveyance, regardless of whether the assignee thereof assumes such liabilities, charges, or obligations. If any such liabilities, charges, or obligations (accrued prior to the date of such conveyance) are paid by or on behalf of any person or entity other than the Corporation, such person or entity shall have a claim to direct reimbursement from the Corporation, together with interest on the amount so paid.

[(b) CONVEYANCE.—(1) A conveyance referred to in subsection (a) of this section may be effected only if—

(A) the assignee to whom such conveyance is made assumes all of the obligations under any applicable conditional sale agreement, equipment trust agreement, or lease with respect to such rail properties (including any obligations which accrued prior to the date on which such rail properties are conveyed),

(B) such conveyance is made subject to such obligations, and

(C) in the event of a conveyance of property to persons other than Class I or II railroads, such conveyance must be approved by any party who is an owner, lessor, equipment trustee, or conditional sale vendor to the Corporation on any debt instrument imposing a lien or encumbrance on or otherwise affecting the title or interest in the rail properties to be conveyed, provided that such approval may not be unreasonably withheld and may be withheld only for lack of credit worthiness.

As used in this paragraph, the term "rail properties" means assets or rights owned, leased, or otherwise controlled by the Corporation, other than real property, which are used or useful in rail transportation service.

[(2) Subject to the provisions of this subsection, the provisions of this title shall not affect the title and interests of any lessor, equipment trust trustee, or conditional sale vendor under any conditional sale agreement, equipment trust agreement, or lease under section 1168 of title 11, United States Code. An assignee to whom such a conveyance is made shall assume all liability under such conditional sale agreement, equipment trust agreement, or lease. Such an assignment or conveyance to, and such an assumption of liability by such an assignee, shall not be deemed a breach, an event of default, or a violation of any covenant of any such conditional sale agreement, equipment trust agreement, or lease so assigned or conveyed, notwithstanding any provision of any such agreement or lease.]

Section 410 of that Act

[SUBSIDIARIES

[SEC. 410. The Corporation, by January 1, 1982 shall identify those of its subsidiaries (other than the Conrail Equity Corporation) which did not operate at a profit during the preceding 12-month period, and shall, not later than 12 months after the date of enactment of this subtitle, seek to sell any subsidiary identified as not profitable unless the Association determines that the benefits of maintaining ownership of such subsidiary outweigh the financial loss resulting from such ownership.]

Section 411 of that Act

[LABOR TRANSFER AGREEMENTS

[SEC. 411. (a) IMPLEMENTING AGREEMENT.—Within 30 days after the date any freight transfer agreement is entered into under this title, any Class I or Class II railroad purchasing rail properties under such agreement, including any entity that attains such status on the transfer date, and the representatives of the various crafts or classes of employees of the Corporation to be transferred to such railroad or other entity shall commence implementing agreement negotiations. Such negotiations shall—

[(1) determine the number of employees to be transferred to such railroad;

[(2) identify the specific employees of the Corporation to whom such railroad or other entity offers employment;

[(3) determine the procedure by which such employees may elect to accept employment with such railroad or other entity;

[(4) determine the procedure for acceptance of such employees into employment with such railroad or other entity;

[(5) determine the procedure for determining the seniority of such employees in their respective crafts or classes in the system of such railroad or other entity, which shall, to the

extent possible, preserve their prior freight service seniority rights; and

[(6) ensure that all such employees are transferred to such railroad or other entity no later than 120 days after the date the transfer agreement is entered into under this title.

[(b) DECISION OF REFEREE.—(1) If no agreement with respect to the matters being negotiated pursuant to subsection (a) is reached within 30 days after the date such negotiations are commenced, the parties to the negotiations shall, within an additional 10 days, select a neutral referee. If the parties are unable to agree upon the selection of such a referee, the National Mediation Board shall promptly appoint a referee.

[(2) The referee shall commence hearings on the matter being negotiated pursuant to subsection (a) within 10 days after the date he is selected or appointed, and shall render a decision within 30 days after the date of commencement of such hearings. All parties may participate in the hearings, but the referee shall have the only vote.

[(3) The referee shall resolve and decide all matters in dispute with respect to the negotiation of the implementing agreement or agreements. The referee's decision shall be final and binding to the same extent as an award of an adjustment board under section 3 of the Railway Labor Act, and shall constitute the implementing agreement or agreements between the parties. The National Mediation Board shall fix and pay the compensation of such referees.]

Section 412 of that Act

[LABOR CONDITIONS

[SEC. 412. (a) NEW YORK DOCK.—Employees of the Corporation who are transferred under this title shall be entitled to the labor protection benefits set forth in New York Dock Railway-Control-Brooklyn Eastern Terminal, 360 ICC 60 (1979), except as provided in subsection (b) of this section.

[(b) ALTERNATIVES.—(1) If the entity to which such employees are transferred was a railroad under the provisions of subtitle IV of title 49, United States Code, prior to the date of transfer, and the parties are unable to reach a collective bargaining agreement under procedures referred to in subsection (a), the collective bargaining agreement in effect between such railroad and its employees shall govern.

[(2) If the entity to which such employees are transferred was not a railroad under the provisions of subtitle IV of title 49, United States Code, prior to the date of transfer, and the parties are unable to reach a collective bargaining agreement under procedures referred to in subsection (a), the collective bargaining agreement in effect between the Corporation and its employees prior to the date of transfer shall govern.

[(c) CLASS III EXEMPTION.—The provision of this section shall not apply to any Class III carrier.]

Section 701 of that Act

EMPLOYEE PROTECTION AGREEMENT

[SEC. 701. (a)–(c) * * *
(d)(1) * * *
(2) No individual shall become eligible for benefits under this section after [the last day of the eighteen-month period beginning on] the date of transfer under section 401 or 404 of this Act.

Section 703 of that Act

PREFERENTIAL HIRING

SEC. 703. (a) * * *
(b) IMPLEMENTATION OF SECRETARY'S PLAN.—Any employee of any railroad who is deprived of employment as a result of the implementation of the Secretary's Plan shall have the first right of hire for a vacancy for which he is qualified on any Norfolk Southern Corporation rail subsidiary, except where such vacancy is covered by (1) an affirmative action plan, or a hiring plan designated to eliminate discrimination, that is required by Federal or State statute, regulation, or Executive order, or by the order of a Federal court or agency, or (2) a permissible voluntary affirmative action plan. For purposes of this subsection, a railroad shall not be considered to be hiring new employees when it recalls any of its own furloughed employees.
[(b)] *(c)* STATUS.—The first right of hire afforded to employees under this section shall be coequal to the first right of hire afforded under section 8 of the Milwaukee Railroad Restructuring Act (45 U.S.C. 907) and section 105 of the Rock Island Transition and Employee Assistance Act (45 U.S.C. 1004).

CROSS CRAFT EMPLOYMENT

SEC. 703A. Any employee of Norfolk and Western Railway Company, Southern Railway Company, or the Corporation who is deprived of employment as a result of the implementation of the Secretary's Plan shall have the first right of hire for any vacancy for which such employee is qualified at the entry level on any Norfolk Southern Corporation rail subsidiary, without regard to craft or class or the provisions of section 703 of this Act. Such employee shall retain his seniority rights to return to his original craft or class whenever a vacancy occurs. For purposes of this section, a railroad shall not be considered to be hiring new employees when it recalls any of its own furloughed employees.

Section 713 of that Act

[AUTHORIZATION OF APPROPRIATIONS

[SEC. 713. There are authorized to be appropriated to carry out the provisions of this title not to exceed $385,000,000. Of the amounts authorized to be appropriated under this section, not more than $115,000,000 shall be available solely for termination allowances under section 702 of this Act. Any amounts not expended for termination allowances under section 702 shall be available for

purposes of section 701 of this Act. In addition to funds authorized under this section, any funds appropriated under section 509(b)(1) of the Railroad Revitalization and Regulatory Reform Act of 1976 (45 U.S C. 829(b)(1)) for use under section 216(b)(3) of the Regional Rail Reorganization Act of 1973 shall be available to the Association, and the Association shall make available to the Corporation as a grant such funds to accomplish the purposes of this title. Amounts appropriated under this section are authorized to remain available until expended.]

Section 714 of that Act

ARBITRATION

SEC. 714. * * *

PROTECTION AFTER SALE

SEC. 715. After consummation of the sale of the interest of the United States in the common stock of the Corporation pursuant to the Secretary's Plan, any employee of Norfolk Southern Corporation, the Corporation, any rail affiliate of either company, and any transferee of the rail tracks, rights, and facilities divested in accordance with the Secretary's Plan, who is adversely affected in his employment by the implementation of the Secretary's Plan shall receive from his employer protection under the labor protective conditions set forth in New York Dock Railway—Control—Brooklyn Eastern District Terminal (354 ICC 399 (1978), modified upon further consideration, 360 ICC 60 (1979)). The arbitration provisions of section 4 of New York Dock shall apply to the formation of any implementing agreements that may be necessary in connection with the implementation of the Secretary's Plan, including any resulting coordinations.

Section 1154 of that Act

[SATISFACTION OF CLAIMS

[SEC. 1154. No distribution of the assets of Conrail shall be made with respect to any claims of the United States, including the securities issued pursuant to section 216 of the Regional Rail Reorganization Act of 1973 (45 U.S.C. 726), until all other valid claims, including loss, damage, overcharge claims, and lease claims, against Conrail have been satisfied, or provision has been made for satisfying such claims.]

THE NORTHEAST RAIL SERVICE ACT OF 1981

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Section 1135 of that Act

DEFINITIONS

SEC. 1135. (a) As used in this subtitle, unless the context otherwise requires, the term:

(1)–(5) * * *

(6) "Definitive Agreements" means any and all agreements existing or to be developed between the United States and Norfolk Southern Corporation, including all representations and war-

ranties made therein, to implement the Memorandum of Intent described in paragraph (9)(A);

[(6)] *(7)* "Rail carrier" means a common carrier engaged in interstate or foreign commerce by rail subject to subtitle IV of title 49, United States Code

[(7)] *(8)* "Secretary" means the Secretary of Transportation.

(9) "Secretary's Plan" means (A) the Memorandum of Intent between the United States and Norfolk Southern Corporation signed February 8, 1985, and (B) the divestitures by the Norfolk Southern Corporation of certain rail tracks, rights, and facilities, and any transactions or agreements related or incidental to such divestitures, in connection with the implementation of attachment A to the letter from the Department of Justice attached to the Memorandum of Intent as exhibit E;

[(8)] *(10)* "Special court" means the judicial panel established under section 209 of the Regional Rail Reorganization Act of 1973 (45 U.S.C. 719).

Section 1152 of that Act

JUDICIAL REVIEW

SEC. 1152. (a) Notwithstanding any other provision of law, the special court shall have original and exclusive jurisdiction over any civil action—

(1) for injunctive, declaratory, or other relief relating to the enforcement, operation, execution, or interpretation of any provision of or amendment made by this subtitle *or the Conrail Sale Amendments Act of 1985*, or administrative action taken thereunder to the extent such action is subject to judicial review;

(2) challenging the constitutionality of any provision of or amendment made by this subtitle *or the Conrail Sale Amendments Act of 1985*;

(3) to obtain, inspect, copy, or review any document in the possession or control of the Secretary, Conrail, the United States Railway Association, or Amtrak that would be discoverable in litigation under any provision of or amendment made by this subtitle *or the Conrail Sale Amendments Act of 1985*; [or]

(4) seeking judgment upon any claim against the United States founded upon the Constitution and resulting from the operation of any provision of or amendment made by this subtitle *or the Conrail Sale Amendments Act of 1985*[.]

(5) brought by the United States or any agency or instrumentality thereof seeking to enforce the Secretary's Plan or the Definitive Agreements;

(6) brought by Norfolk Southern Corporation seeking to enforce the Secretary's Plan or the Definitive Agreements;

(7) brought by a party who filed a complaint with the Secretary under subsection (e) of this section, and who is aggrieved by (A) a determination of the Secretary under paragraph (1) of such subsection that the party has not suffered direct economic

injury, or (B) a decision of the Secretary under paragraph (2) of such subsection that a convenant has not been violated;

(8) brought by a party which is a signatory to an ancillary agreement entered into in accordance with the Secretary's Plan or the Definitive Agreements and which is seeking to enforce such ancillary agreement; or

(9) brought to determine the value of the interest of the employee stock ownership plan and related trusts, or of the beneficiaries thereof, in the preferred stock of the Conrail Equity Corporation.

For purposes of any action brought under paragraph (5) of this subsection, a violation of any covenant contained in the Secretary's Plan or the Definitive Agreements shall be deemed to constitute immediate and irreparable harm for purposes of awarding injunctive relief to the United States.

(b) A judgment of the special court in any action referred to in this section shall be reviewable only upon petition for a writ of certiorari to the Supreme Court of the United States, except that any order or judgment enjoining the enforcement, or declaring or determining the unconstitutionality or invalidity, of any provision of this subtitle *or the Conrail Sale Amendments Act of 1985* shall be reviewable by direct appeal to the Supreme Court of the United States. Such review is exclusive and any petition or appeal shall be filed not more than 20 days entry of such order or judgment.

(c) Administrative action under the provisions of or amendments made by this subtitle *or the Conrail Sale Amendments Act of 1985* which is subject to review shall be upheld unless such action is found to be unlawful under standards established for review of informal agency action under paragraphs (2)(A), (B), (C), and (D) of section 706, title 5, United States Code. The requirements of this subtitle *or the Conrail Sale Amendments Act of 1985* shall constitute the exclusive procedures required by law for such administrative action.

(d) If the volume of civil actions under subsection (a) of this section so requires, the United States Railway Association shall apply to the judicial panel on multi-district litigation authorized by section 1407 of title 28, United States Code, for the assignment of additional judges to the special court. Within 30 days after the date of such application, the panel shall assign to the special court such additional judges as may be necessary to exercise the jurisdiction described in subsection (a) of this section.

(e)(1) Any party who suffers direct economic injury as a result of an alleged violation of a covenant contained in the Definitive Agreements may file a complaint with the Secretary seeking enforcement of such covenant. If the Secretary determines that the complainant has demonstrated to the Secretary that it has suffered direct economic injury, the Secretary shall investigate the complaint.

(2) If the Secretary decides to investigate a complaint under paragraph (1) of this subsection, the Secretary shall give reasonable notice of such decision to investigate to the alleged violator of such covenant and the complainant, and shall make a final decision on such complaint within 60 days after the date on which it was filed.

(3) If the Secretary finds that (A) the covenant in question has been violated, and (B) the complainant suffered direct economic

injury as a result of such violation, the Secretary shall enter an order directing the violator of such covenant to comply with such covenant.

(4) On appeal, any decision by the Secretary under this subsection shall be upheld, unless such decision is found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

Section 1161 of that act

[LIGHT DENSITY RAIL SERVICE

[SEC. 1161. (a) At any time after the effective date of this subsection, the Secretary may enter negotiations for the transfer of—

[(1) any rail lines of Conrail which are the subject of an abandonment proceeding pending before the Commission other than an abandonment proceeding subject to section 308 of the Regional Rail Reorganization Act of 1973; and

[(2) any rail lines of Conrail which are designated in Category I under Commission regulation. The Secretary may transfer any such lines in accordance with the terms of an agreement entered into by the Secretary under this subsection.

[(b)(1) All reasonable expenses which are incurred in negotiations for the purchase of rail properties by a railroad which subsequently purchases such properties in accordance with the provisions of this section shall be credited against the total purchase price for such properties if such purchaser entered into such negotiations in good faith within six months after the effective date of this section.

[(2) Expenses for labor protection, for a maximum of a twelve-month period, incurred by a purchaser of rail properties in accordance with the provisions of this section as a result of protective conditions imposed pursuant to section 412 of the Regional Rail Reorganization Act of 1973 shall be credited against the total purchase price for such properties if such purchaser entered into such negotiations in good faith within six months after the effective date of this section.

[(c) As a part of each transfer negotiation authorized and directed by section 405 of the Regional Rail Reorganization Act of 1973, the Secretary shall promote the inclusion of those additional Conrail lines that connect with, and only with, the line or lines that are the subject of particular transfer negotiations (hereinafter in this section referred to as "associated branch lines"), and which are financially viable.

[(d) In the event that a transfer agreement granted final approval by the Secretary under section 1142 of this subtitle does not provide for the continuation of rail service on an associated branch line, or other Conrail line not designated for transfer, that an affected State, shipper, or connecting railroad (other than a Class I or II railroad) concludes is essential, that State, shipper, or connecting railroad, or any combination of such States, shippers, or railroads, may immediately enter negotiations with the Secretary for the transfer of identified associated branch lines or other Conrail line not designated for transfer without rail-common carrier

status under the requirements of subtitle IV of title 49, United States Code, to an entity designated by the State, shipper, railroad, or combination thereof, for continued operation free of the common carrier obligations and other requirements, except those provided for in subsection (f), of subtitle IV of title 49, United States Code. Contrail shall convey an associated branch line or other Conrail line not designated for transfer in accordance with the terms of an agreement entered into by the Secretary under this subsection.

[(e) The Secretary may transfer lines in accordance with the provisions of this section for nominal consideration, if justified by the public benefit associated with continued rail service.

[(f) The Commission shall establish fair and equitable divisions of revenues on joint rates until a final order is issued.]

Section 1166 of that Act

[TRACKAGE RIGHTS

[SEC. 1166. At any time after the effective date of this subtitle, the Commission may approve, under the provisions of existing law, the grant of trackage rights to any terminal railroad operating primarily in the city of Philadelphia over the individual lines of Conrail located in the city and port of Philadelphia.]

Section 1167 of that Act

TECHNICAL AMENDMENTS

SEC. 1167. (a)-(b) * * *

[(c)(1) The clerk of the special court shall convey to the Secretary within 10 days after the effective date of this subtitle the series B preferred stock and the common stock of Conrail which are then on deposit with the special court pursuant to section 303 of the Regional Rail Reorganization Act of 1973 (45 U.S.C. 743).

[(2) The Secretary is authorized to hold and to exercise all rights that pertain to the Conrail securities conveyed under paragraph (1) of this subsection, and any other securities of Conrail that have been or may be conveyed to the Secretary under any agreement or pursuant to the terms of part 5 of this subtitle or the terms of any other law.]

Section 1168 of that Act

APPLICABILITY OF OTHER LAWS

SEC. 1168. (a) The provisions of the chapters 5 and 7 of the United States Code (popularly known as the Administrative Procedure Act and including provisions popularly known as the Government in the Sunshine Act), the Federal Advisory Committee Act, section 102(2)(C) of the National Environmental Policy Act of 1969, the National Historic Preservation Act of 1966, and section 4(f) of the Department of Transportation Act of 1966 are inapplicable to actions taken in negotiating, approving, or implementing [service transfers] *sale of the interest of the United States in the common stock of Conrail or transfer of the rail properties and freight service*

responsibilities of Conrail under title IV of the Regional Rail Reorganization Act of 1973.

[(b) The operation of trains by Conrail shall not be subject to the requirement of any State or local law which specifies the minimum number of crew members who must be employed in connection with the operation of such trains.]

THE RAILROAD REVITALIZATION AND REGULATORY REFORM ACT OF 1976

Section 501 of that Act

SEC. 501. As used in this title, the term—

(1)–(7) * * *

(8) "restructuring" means [(A)] any activity (including a consolidation, coordination, merger or abandonment) which [(i)]*(A)* involves rehabilitation, or improvement of a facility or the transfer of a facility, and [(ii)]*(B)* improves the long-term profitability of any railroad freight system through the achievement of higher average traffic densities or improved asset utilization; [or (B) the transfer from the Corporation to any railroad or financially responsible person (as defined in section 10910(a)(1) of title 49, United States Code) for common carrier rail service of ownership or operating rights on any rail line owned or operated by the Corporation where the Secretary determines that such acquisition will provide needed transportation benefits, and that such line will not require further Federal subsidy;]

(9)—(10) * * *

Section 505 of that Act

REHABILITATION AND IMPROVEMENT FINANCING

SEC. 505. (a) IN GENERAL.—(1) Any railroad [(or any financially responsible person, as defined in section 10910(a)(1) of title 49, United States Code, who acquires from the Corporation for common carrier rail service any rail line owned by the Corporation on the effective date of the Northeast Rail Servcice Act of 1981)] may apply to the Secretary, following the date of enactment of this Act and in accordance with regulations promulgated by the Secretary, for financial assistance for facilities rehabilitation and improvement financing and for such other financial assistance as may be approved by the Secretary. Any regulations promulgated by the Secretary pursuant to this section shall include specific and detailed standards in accordance with which the Secretary shall conduct the evaluation and make the determinations required in subsection (b)(2) of this section.

(2)—(3) * * *

(b)(1) * * *

(2) The Secretary shall act upon each such application within 6 months after the date on which all required information is received, except as otherwise provided in subsection (a)(2) of this section. The Secretary may approve any such application if he deter-

mines that providing the requested financial assistance is in the public interest. When making such a determination, the Secretary shall evaluate and consider in the following order of priority (A) the availability of funds from other sources at a cost which is reasonable under principles of prudent railroad financial management in light of the railroad's projected rate of return for the project to be financed and the railroad's rate of return on total capital (represented by the ratio which such carrier's net income, including interest on a long-term debt, bore to the sum of average shareholder's equity, long-term debt, and accumulated deferred income tax for fiscal year 1975) as determined in accordance with the uniform system of accounts promulgated by the Commission, (B) the interest of the public in supplementing such other funds as may be available in order to increase the total amount of funds available for railroad financing, and (C) the public benefits, including any significant railroad restructuring, to be realized form the project to be financed in relation to the public costs of such financing and whether the proposed project will return public benefits to justify such public costs [or, where the application relates to a rail line owned or operated by the Corporation immediately prior to its acquisition by a railroad or financially responsible person (as defined in section 10910(a)(1) of title 49, United States Code) for common carrier rail service, whether the financial assistance applied for under this section will further the public interest in transferring rail lines from the Corporation to the private sector, and avoid the need for any further Federal subsidy]. Except as provided in the last sentence of this paragraph, the Secretary, in determining the extent to which a project will provide public benefits, shall give the highest priority to projects which will enhance the ability of the applicant carrier or other carriers to provide essential freight services. With respect to funds appropriated for financial assistance under this section which were authorized pursuant to section 803(a) and (b) of the Powerplant and Industrial Fuel Use Act of 1978, applications for such funds for the purpose of coal transportation shall be deemed to be for the provision of essential freight services. The Secretary, in granting financial assistance to any applicant, shall assign the highest priority, among applications for assistance which would return equal public benefits, to applications for assistance for providing safety improvements and signals, including underpasses or overpasses at railroad crossings at which injury or loss of life has frequently occurred or is likely to occur. The Secretary shall assign the highest priorities (i) to those meritorious applications of carriers operating under section 77 of the Bankruptcy Act unable to generate such funds in the private sector and (ii) to those meritorious applications for funds to provide for the restructuring of rail freight facilities and systems which handle more than two million rail cars annually, which are located in more than one State, and which are separated by the Mississippi River.

(3) * * *

(c)—(h) * * *

Section 509 of that Act

AUTHORIZATIONS

SEC. 509. (a) * * *

(b)[(1) Not more than $200,000,000 of the funds received by the Secretary of Transportation from amounts appropriated under subsection (a) of this section shall be transferred by the Secretary to the United States Railway Association for use by the Association in accordance with section 216(b)(3) of the Regional Rail Reorganization Act of 1973 (45 U.S.C. 726(b)(3)). Such funds shall be transferred immediately upon the finding by the Finance Committee under such section 216(b)(3).]

(2)–(5) * * *

Section 511 of that Act

GUARANTEE OF OBLIGATIONS

SEC. 511. (a)–(d) * * *

(e) EXTENT OF AUTHORITY.—[(1)] The aggregate unpaid principal amounts of obligations which may be guaranteed by the Secretary under this section shall not exceed $1,000,000,000 at any one time[, of which not to exceed $150,000,000 may be guaranteed for the purposes described in paragraph (2) of this subsection.

[(2) Obligations may be guaranteed for the purpose of improving rail properties designated in the final system plan pursuant to section 206(c)(1)(C) of the Regional Rail Reorganization Act of 1973 (45 U.S.C. 716(c)(1)(C), if the proceeds of such obligations shall be or have been used to acquire or rehabilitate and improve facilities or equipment in a manner that returns the most public benefits for the costs involved.].

(f)–(m) * * *

THE RAIL SAFETY AND SERVICE IMPROVEMENT ACT OF 1982

Section 402 of that Act

[TRANSACTION ASSISTANCE

[SEC. 402. Notwithstanding any other provision of law, any financially responsible person (including any government authority), except for a class I rail carrier, shall upon application be eligible for financial assistance made available in section 505 of the Railroad Revitalization and Regulatory Reform Act of 1976 (45 U.S.C. 825) for the purchase, lease, or rehabilitation of rail lines of the Consolidated Rail Corporation which are to be used for common carrier rail service and with respect to which an application for a certificate of abandonment has been filed with the Interstate Commerce Commission under section 308(a) of the Regional Rail Reorganization Act of 1973 (45 U.S.C. 748(a)), or a notice of insufficient revenues has been filed with the Commission under section 308(c) of the Regional Rail Reorganization Act of 1973 (45 U.S.C. 748(c)).]

THE RAIL PASSENGER SERVICE ACT

Section 1005 of that Act

SEC. 1005. PRIVATE SECTOR DEVELOPMENT.

(a) * * *

(b) In order to carry out the purposes of this section, the Secretary shall—

(1) in cooperation with private rail carriers, the Corporation, [the Consolidated Rail Corporation,] commuter agencies, and State and local transportation authorities, take all necessary steps to remove institutional and legal barriers to the private development of rail passenger corridors;

(2)–(3) * * *

(c) * * *

TITLE 49, UNITED STATES CODE

Section 332 of that title

§ 332. Minority Resource Center

(a)–(c) * * *

(d) The United States Railway Association[, the Consolidated Rail Corporation,] and the Secretary shall provide the Center with relevant information (including procurement schedules, bids, and specifications on particular maintenance, rehabilitation, restructuring, improvement, and revitalization projects) the Center requests in carrying out this section.

Section 10362 of that title

§ 10362. Duties

(a) * * *

(b) The Rail Services Planning Office shall—

(1)–(6) * * *

(7) maintain regulations that—

(A) develop an accounting system permitting the collection and publication [by the Consolidated Rail Corporation or] by profitable rail carriers providing transportation over lines scheduled for abandonment, of information necessary for an accurate determination of the attributable revenues, avoidable costs, and operations of light density lines as operating and economic units; and

(B) determine the avoidable cost of providing rail freight transportation; and

(8) * * *

(c)–(d) * * *

MINORITY VIEWS OF MR. ROCKEFELLER

I oppose the action of the full Committee to report S. 638, legislation implementing the Secretary of Transportation's recommendation to sell Conrail to NS. I add these minority views not as a comprehensive rebuttal to the majority report, but merely to highlight the rationale for my divergence with the majority of the Committee.

I did not arrive at this conclusion easily, but only after a comprehensive and probing look at every aspect of the Secretary's recommendation and with adequate deference to the expertise of DOT personnel. I have found the Secretary's recommendation to be a credible and serious effort and it is obvious that a good deal of time and serious thinking has gone into the proposal. Nevertheless, I do not believe that the combination of Conrail and NS is the best choice for the Nation or West Virginia and I have sufficient doubt about the prospects of rail competitiveness and service, especially for West Virginia and the markets we serve, that I have voted against this proposal.

When the Committee began its deliberations on the recommendation of the Secretary, I believed that the burden should be on the administration and, in this case, NS, to prove with reasonable certainty that at least the same, if not an improved level of service, efficiency and competition, would be realized in the Nation and West Virginia. Despite the congressionally mandated goal of returning Conrail to the private sector, which I think is an appropriate objective, I have not interpreted our continuing role as being limited to mere acceptance of that recommendation as the only possible outcome. On the contrary, I have believed it to be the obligation of the Committee and Congress to examine all the circumstances since the passage of the Northeast Rail Services Act of 1981 and critically evaluate, accept, modify or reject the Secretary's recommendation in that light.

Based on the record before the Committee, which, although voluminous, lacks information critical to a comprehensive evaluation of the NS-Conrail combination, I have concluded that the claims of increased competitiveness and efficiency are at best tenuous, and at worst totally invalid. In making this negative judgment it is important to note that it has been made even on the incomplete record before us. The Committee has had incomplete information regarding the potential anticompetitive aspects of the sale to NS, only a tentative statement of what divestitures are required to cure the anticompetitive circumstances that have been found, no specific divestiture plan, no operating plan for the combined railroad, no traffic study to identify with certainty the major changes expected in rail service from the combined railroad and no financial projections of the combined railroad for the next several years (so-called "pro formas"). In all, it is an insufficient record on which to con-

clude the Committee's deliberations, and an even less convincing record on which to base a recommendation that the Senate act affirmatively to pass the legislation.

Obviously, my first and foremost responsibility in examining the sale to NS has been to look at the impact on West Virginia and the markets served by West Virginia. Conrail is not currently a major rail carrier in the State, and, in fact, falls well behind both the Chessie system and NS in terms of the amount of goods hauled. Nevertheless, the independent existence of Conrail has been both a direct and indirect factor in competition, because it has acted aggressively to establish more efficient rates on coal haulage and to develop new markets. To reduce our service options from three to two railroads, or from two to one, is on its face, and, after careful scrutiny, unwise.

In my view, the combination of Conrail and NS gives such significant market power to one carrier in important West Virginia markets that the effect on West Virginia shippers, especially coal shippers, may well be severe. It is a prescription for significant competitive abuse, market domination and potential coal origination diversions.

Although the potential competitive problems in West Virginia are significant, I do not believe they are unique to West Virginia. Rather our problems are indicative of circumstances all over the Northeast and Midwest. Likewise, I think that the questions that still remain on the West Virginia situation, remain unanswered for the rest of the country. What will the effect of the NS-Conrail combination be on the continuing operation of the Staggers Rail Act of 1980, which, in my view, already has some serious problems with regard to captive shippers, many of whom are coal producers or users? Will the reduction of eastern reilroads from three to two seriously impact shippers? Will the lines proposed for divestiture survive when in direct competition with the massive combined NS-Conrail system? Are other divestitures required? What will be the long term impact on routes and route closings of this combination? What will be the impact on existing railroad interchanges? Will a sale to NS create hardship for other rail lines that will come back to haunt us through a reduction of service and/or employment? What will be the impact of this combination of railroads on other railroads, both in the East and the Midwest?

Aside from questions about the potential effects on competition, I think that significant questions remain with regard to the number of rail jobs that might be affected by this proposal, with regard to the complex tax aspects of this transaction, with regard to the actual return to the Government, with regard to the effect it would have on the ability of the Northeast and Midwest to attract and maintain industry, and with regard to actual and potential traffic diversions. This list is by no means comprehensive but a fair sampling of legitimate concerns and questions that are in need of further exploration.

It has been discussed during the course of the hearings before the Commerce Committee that alternatives do exist. In fact during the preparation of this Committee report, efforts on the part of the investment firm of Morgan Stanley have produced a proposal worthy of our strong consideration. I view very positively the addi-

tion of this proposal to the debate, but I reserve all but a brief comment for future Committee deliberations and/or floor debate.

I think the willingness of a sophisticated investor group to make a public offering for Conrail is testament to the strength of the recovery Conrail has made, confirmation of the latest projections regarding Conrail's long term viability and indicative of Conrail's ability to prosper as an independent railroad. Under these circumstances, much of the justification of the proposed sale to NS—their so-called "deep pockets"—is diminished, while the loss of a vigorous competitor looms larger. I hope all Senators will give the Morgan Stanley proposal the same critical evaluation and attention that has been given the NS offer and that the Senate will hold a full and complete debate on the entire matter.

In sum, I oppose legislation to implement the Secretary's recommendation to sell Conrail to NS because I think it asks West Virginians and others throughout the East and Midwest to gamble on the future of competition and service in the region. In other words, I do not think the administration has met the burden of proof I believed they must when we began this debate. I think the Congress must try to move forward to fulfill our own mandate of returning Conrail to the private sector, but I do not think it should be done by way of this proposal.

With all due respect for the conclusions of the majority of the Committee, I oppose the bill as reported.

JOHN D. ROCKEFELLER IV.

APPENDIX

THE UNITED STATES OF AMERICA
NORFOLK SOUTHERN CORPORATION
MEMORANDUM OF INTENT

WHEREAS, the Regional Rail Reorganization Act of 1973, as amended by the Northeast Rail Service Act of 1981, as amended, provides for a plan for the sale of the interest of the United States of America ("Seller") in the common stock, par value $1.00 per share (the "Common Stock"), of Consolidated Rail Corporation, a Pennsylvania corporation ("Conrail") to be established, if the Board of Directors of the United States Railway Association ("USRA") determined that Conrail would be a "profitable carrier" (as that term is defined in 45 U.S.C. §763) and that Conrail was a profitable carrier durin the period beginning June 1, 1983, and ending October 31, 1983;

WHEREAS, the Board of Directors of USRA determined that Conrail would be a profitable carrier and was a profitable carrier during such period;

WHEREAS, on May 10, 1984, Seller published notice in the Federal Register soliciting offers from any and all parties interested in purchasing the interest of Seller in the Common Stock of Conrail;

WHEREAS, Norfolk Southern Corporation, a Virginia Corporation ("Buyer"), has submitted such an offer and has subsequently revised and supplemented it;

WHEREAS, Buyer's offer includes provisions relating to employees and Buyer has consulted with labor representatives concerning such provisions;

WHEREAS, Seller and Buyer have reached an agreement in principle with respect to the major terms and conditions upon which Seller will sell to Buyer and Buyer will purchase from Seller the interest of Seller in the Common Stock of Conrail;

WHEREAS, in order to document such agreement in principle, Seller and Buyer have prepared this Memorandum of Intent, and have agreed to use their best efforts to negotiate, execute and deliver a definitive agreement for the purchase and sale of the interest of Seller in the Common Stock of Conrail (the "Definitive Agreement") reflecting the terms and conditions set forth herein, as promptly as practicable following the approval of Congress and the

enactment of legislation with respect to the transactions contemplated hereby;

WHEREAS, Seller and Buyer contemplate that legislation will be necessary to implement the transactions contemplated by this Memorandum of Intent;

WHEREAS, Seller and Buyer recognize that at or before the consummation of the transactions contemplated hereby, Buyer or Conrail (as the case may be) shall have made appropriate arrangements with respect to Conrail's "agreement employees" (as referred to in 45 U.S.C. §1103), "non-agreement employees" (as referred to in 45 U.S.C. §1103), and with the Internal Revenue Service (the "IRS"), all as more fully set forth herein.

NOW THEREFORE, Seller and Buyer have executed this Memorandum of Intent this 8th day of February, 1985.

Buyer and Seller agree in principle as follows:

1. Purchase. Subject to the cancellations provided for in Paragraph 3 hereof, Buyer will purchase 25,000,000 shares of Common Stock of Conrail (the "Shares") from Seller at a closing (the "Closing") for a consideration consisting of (i) $1.2 billion in immediately available funds (the "Cash Purchase Price"), (ii) the surrender of the right of Buyer or Conrail to use, after the Closing, any of Conrail's net operating loss carryforwards or any of Conrail's other carryforwards, including investment tax credit carryforwards, existing at the Closing against federal gross income or federal income taxes of Conrail or Buyer attributable to taxable years beginning on or after the Closing, and (iii) Excess Cash payable in accordance with Paragraph 13(1).

2. Arrangements for Employees. At or prior to the Closing, Buyer or Conrail shall have made appropriate arrangements with respect to the employees of Conrail to accomplish (i) the acquisition by Buyer of such employees' 15% beneficial interest in Conrail, (ii) the satisfaction of any employee claim against Conrail arising from prior wage concessions, (iii) the provision of New York Dock labor protection for employees adversely affected by the transaction, including the Divestiture required by Exhibit E, with provision for any necessary arbitration of resulting implementing agreements, and (iv) fairness to non-

agreement employees. A copy of a summary of Buyer's proposed arrangements with respect to certain rights, options and wage claims of Conrail employees is annexed hereto as Exhibit A.

3. Cancellation of Debt, Preferred Stock and Related Obligations. Subject to the enactment into law of the legislation referred to in Paragraph 9(d), Seller shall take all action necessary to cause Conrail to be recapitalized such that, effective at and as of the Closing, all of the presently issued and outstanding preferred stock of Conrail (together with all accrued and unpaid dividends thereon), all outstanding Contingent Interest Notes and Subordinated Debentures of Conrail (together with any interest accrued thereon) and all other commitments or obligations of Conrail to Seller arising out of Seller's interests in such preferred stock, Contingent Interest Notes and Subordinated Debentures shall be cancelled or retired, and contributed to the capital of Conrail.

4. Closing Agreement. As a condition to Seller's obligation to sell the Shares to Buyer at the Closing, Conrail and the IRS shall have entered into a Closing Agreement (as that term is defined in Section 7121 of the Internal Revenue Code of 1954, as amended (the "Code")), providing (i) that Conrail's taxable year shall close as of the Closing, (ii) that Conrail's net operating loss carryforwards (except to the extent such carryforwards are attributable solely to reductions required by the IRS in the adjusted tax basis of Conrail's depreciable or amortizable assets as reflected in its U.S. Corporation Income Tax Return (Form 1120) for the taxable year ending on the Closing) and Conrail's other carryforwards, including investment tax credit carryforwards, existing as of the Closing shall not be available for carryover to taxable years beginning on or after the Closing and (iii) that the adjusted tax basis of Conrail's assets shall not be increased by any adjustment to a taxable year ending on or before the Closing.

5. Financing of Transaction. Buyer will raise the funds required to pay the Cash Purchase Price in the manner described in Exhibit B hereto. Buyer shall deliver such further documentation with respect to the financing of the transactions contemplated hereby as Seller shall reasonably request.

6. Representations and Warranties of Seller. The Definitive Agreement will contain representations and warranties by Seller to the effect that:

(a) Title. At the Closing, Seller will convey to Buyer good and marketable title to the Shares free and clear of any claim, lien, encumbrance or agreement with respect thereto.

(b) Authority. Subject to the enactment into law of the legislation referred to in Paragraph 9(d), Seller has all necessary authority to execute, deliver and perform the Definitive Agreement.

(c) Binding Obligation. Subject to the enactment into law of the legislation referred to in Paragraph 9(d), the Definitive Agreement constitutes a valid and binding obligation of Seller enforceable against Seller in accordance with its terms (except that the remedy of specific performance may be unavailable).

(d) Litigation; Claims. Except as disclosed in writing to Buyer, Seller has no knowledge of any litigation, claim or other proceeding or investigation pending or threatened which may impair the full performance by Seller of its obligations under the Definitive Agreement.

(e) Tax Matters. (i) The cancellation by Seller on the date of Closing of any interest of Seller in any debt, including accrued interest thereon, and preferred stock, including accrued and unpaid dividends thereon, of Conrail held by Seller (or any agent or instrumentality thereof) shall not result in the recognition of gross income for purposes of the Code (and neither Buyer nor Conrail (or any affiliate) shall be required to make an election under Sections 108 or 1017 of the Code); (ii) except to the extent that basis reductions are covered by the Closing Agreement under Paragraph 4, the adjusted basis at Closing of Conrail's (and its affiliates') depreciable or amortizable assets shall be as shown on its U. S. Corporation Income Tax Return (Form 1120) for the taxable year ending on the Closing determined without extraordinary departures from the methods of prior years and said basis as of Closing shall not thereafter be increased or decreased as a result of any adjustment to a taxable year of Conrail (or any affiliate) ending on or before the Closing; (iii) no gain or loss or income shall be recognized by Buyer or Conrail upon a sale of the Shares to Buyer (or the resulting change in control of Conrail) except in the event Buyer makes, or is deemed to have made, an election under Section 338 of the Code; and (iv) the adjusted tax basis of the assets of Conrail and its affiliates shall not be reduced

as a result of the sale of the Shares to Buyer except in the event Buyer makes, or is deemed to have made, an election under Section 338 of the Code. For the purposes of clauses (iii) and (iv), Buyer shall not be deemed to have made an election under Section 338 of the Code in connection with the sale of the Shares to Buyer as a result of any acquisition of an asset by Buyer (or any affiliate) or Conrail (or any affiliate) that would otherwise trigger the application of Section 338(e)(1) of the Code provided that either (A) Buyer (and its affiliates) elects to treat any such asset acquisitions in accordance with regulations promulgated under Section 338 of the Code or (B) Buyer (and its affiliates) elects under conditions to be agreed upon that the basis of such assets in their hands immediately following such acquisitions shall not exceed the basis of such assets in the hands of the seller of such assets immediately before such acquisitions.

(f) No Further Representations. Seller does not and will not make any representations or warranties of any nature whatsoever, express or implied, except the representations and warranties specifically contained in the Definitive Agreement, and such representations and warranties shall be limited to the matters set forth in this Paragraph 6 and Paragraph 10(e).

7. Representations and Warranties of Buyer. The Definitive Agreement will contain representations and warranties by Buyer to the effect that:

(a) Due Organization; Good Standing. Buyer is a corporation duly organized, validly existing and in good standing under the laws of the Commonwealth of Virginia.

(b) Authority. Buyer has the corporate power and authority to execute, deliver and perform the Definitive Agreement. Such execution, delivery and performance (i) have been duly authorized by all necessary action on the part of Buyer; (ii) will not contravene the certificate of incorporation or by-laws of Buyer; (iii) will not conflict with, result in a breach of, or entitle any party to terminate, accelerate or call a default with respect to any agreement or instrument to which Buyer is a party or by which Buyer or any of its properties is bound; and (iv) will not result in any violation by Buyer of any law, rule, regulation, code or ordinance or any judgment,

order, injunction or decree of any court or governmental authority of competent jurisdiction.

(c) Binding Obligation. The Definitive Agreement constitutes a valid and binding obligation of Buyer, enforceable against Buyer in accordance with its terms (except that the remedy of specific performance may be unavailable and except as enforceability may be limited by applicable bankruptcy, reorganization, insolvency, moratorium or other similar laws affecting creditors' rights generally).

(d) Consents; Approvals. No consent of any party to any agreement, contract, mortgage, indenture or arrangement to which Buyer is a party or by which it or any of its assets or properties is bound, and subject to the enactment into law of the legislation referred to in Paragraph 9(d), no consent, license, permit, approval, order or authorization of any governmental authority, is required to be obtained in connection with the execution, delivery and performance by Buyer of the Definitive Agreement.

(e) Financing Commitments. Buyer has previously furnished Seller with documents and certificates in the form of Exhibit B with respect to all external financing and internal sources of funds which will constitute any portion of the Cash Purchase Price. All representations and other statements made in such documents and certificates are true and correct on the date on which the Definitive Agreement is executed and shall be true and correct at the Closing as though made at and as of each of such dates.

(f) Absence of Material Adverse Change. Except as disclosed in writing to Seller, there has not been any material adverse change in the businesses, assets, financial condition or results of operations of Buyer as reflected in Buyer's most recent Quarterly Report on Form 10-Q for the period ended September 30, 1984.

(g) Litigation; Claims. Except as disclosed in writing to Seller, Buyer has no knowledge of any litigation, claim or other proceeding or investigation pending or threatened which may impair the full performance by Buyer of its obligations under the Definitive Agreement.

(h) Investment Intent. Buyer will acquire the Shares for investment and not with a view to the resale thereof. Buyer acknowledges that the Shares will not be registered under the Securities Act of 1933, as amended, and cannot be sold or otherwise disposed of except in compliance

with the registration provisions of such Act or pursuant to an exemption therefrom.

8. Interim Covenants. The Definitive Agreement will contain interim covenants to the effect that between the date on which the Definitive Agreement is executed and delivered and the Closing:

(a) Best Efforts. Each party will perform all acts to be performed by it prior to the Closing pursuant to the Definitive Agreement and will refrain from taking or omitting to take any action that would violate its representations and warranties thereunder or render them inaccurate as of the date thereof or the Closing or that in any way would impair the consummation of the transactions contemplated thereby. Each party will use its best efforts to satisfy or cause to be satisfied all of the conditions to the obligations of the other party thereunder.

(b) Notice of Breach. Each party will promptly inform the other in writing of the occurrence or failure to occur of any action or event that would violate its representations and warranties under the Definitive Agreement or render them inaccurate as of the date thereof or the Closing or that would constitute a breach of any of its covenants thereunder or a failure of any condition to the obligations of either party thereunder.

9. Conditions to Seller's Obligation. The Definitive Agreement shall provide that the obligation of Seller to sell the Shares to Buyer at the Closing and to consummate the other transactions contemplated thereby shall be subject to the satisfaction or waiver of the following conditions:

(a) Representations and Warranties Correct. All representations and warranties of Buyer made in or pursuant to the Definitive Agreement shall be true and correct in all material respects as of the date made and as of the Closing with the same force and effect as though made at and as of the Closing.

(b) Performance of Obligations. Buyer shall have performed, observed and complied with all the obligations and conditions required by the Definitive Agreement to be performed, observed or complied with by it at or prior to the Closing.

(c) Other Transactions. The arrangements and transactions referred to in Paragraphs 2 and 3 shall have been duly made and consummated at or prior to the Closing.

(d) Legislation. Legislation shall have been enacted, among other things, (i) permitting and authorizing the sale of the Shares to Buyer and the consummation and implementation of the transactions contemplated hereby, including the Divestiture contemplated by Exhibit E, (ii) repealing 45 U.S.C. § 761(d) and acknowledging the private ownership of Conrail from and after the Closing, (iii) acknowledging that the arrangements referred to in Paragraph 2 and Exhibit A will satisfy the intent of 45 U.S.C. § 761(e) in full and repealing such section, (iv) repealing 45 U.S.C. § 762(a), (v) implementing the matters described in Paragraph 2 to the extent legislation is required, and establishing New York Dock protection, including provision for any necessary arbitration of implementing agreements, for employees affected by the transaction, including the Divestiture contemplated by Exhibit E, (vi) exempting from the registration and prospectus delivery requirements of the Securities Act of 1933, from any approval requirement of the Interstate Commerce Act, and from any state securities laws securities issued by Buyer or any affiliate to consummate the transactions contemplated hereby or to fulfill the arrangements referred to in Paragraph 2, (vii) providing a mechanism for definitively valuing the existing Conrail employee stock ownership plan ("ESOP") and relieving from liability parties involved in dealing with Conrail Equity Corporation and the ESOP in connection with providing such valuation, (viii) providing that (1) Buyer and/or Conrail shall be entitled to bring suit in the Court of Claims or any U.S. District Court based on a breach of the representations and warranties of Seller contained in Paragraph 6(e) and to obtain a judgment; (2) such breach shall have occurred upon written assertion known as a 30-day letter by the Internal Revenue Service or the Treasury Department of any liability inconsistent with any such representation or warranty; (3) if such judgment is for money damages, it shall only be awarded in any court or administrative proceeding as an offset against the tax liability of Buyer and/or Conrail to which such breach relates; provided however, that if any such tax liability resulting from such breach has been paid, the judgment may, to that extent, be offset against any tax liability of Buyer or Conrail; and (4) such rights of Buyer and/or Conrail shall not be subject to any waiting period applicable to tax proceedings or to the requirements for payment of any tax as a condition to instituting any suit based on a breach of such representations or warranties, and (ix) providing that the directors of Conrail as of the date of Closing and the fiduciaries of any Conrail ESOP shall not be liable in any proceeding, suit

or action for any damages, compensatory, punitive or otherwise, for any actions taken by them in connection with the implementation of any plan for the sale of the interest of Seller in the Common Stock of Conrail with respect to an ESOP, except for any such actions involving the gross negligence or willful misconduct of such directors or fiduciaries.

(e) Divestiture of Rail Tracks and Facilities. At or prior to the Closing, Buyer shall have entered into, and, at the time Buyer obtains control of Conrail, Buyer shall cause Conrail to enter into an agreement or agreements providing for the divestiture of the rail tracks and facilities contemplated by Exhibit E. In the case of Buyer, such divestiture shall occur prior to or concurrently with the Closing and, in the case of Conrail, such divestiture shall occur no later than or at the time Buyer obtains control of Conrail.

(f) Absence of Material Adverse Change. There shall have been no material adverse change in the businesses, assets, financial condition or results of operations of Buyer since September 30, 1984.

(g) Document Deliveries. Seller shall have received satisfactory instruments and documents of the type customarily delivered at closings of transactions of this nature, including, without limitation, certified resolutions of Buyer's Board of Directors, certificates of Buyer's officers with respect to the accuracy of Buyer's representations and warranties and opinions of counsel to Buyer reasonably acceptable to Seller confirming the legal aspects of Buyer's representations, warranties and conditions contained in the Definitive Agreement.

(h) Closing Agreement. Conrail and the IRS shall have entered into the Closing Agreement described in Paragraph 4.

10. Conditions to Buyer's Obligation. The Definitive Agreement shall provide that the obligation of Buyer to purchase the Shares from Seller at the Closing and to consummate the other transactions contemplated thereby shall be subject to the satisfaction or waiver of the following conditions:

(a) Representations and Warranties Correct. All representations and warranties of Seller made in or pursuant to the Definitive Agreement shall be true and correct in all material respects as of the date made and as of the Closing with the same force and effect as though made at and as of the Closing.

(b) Performance of Obligations. Seller shall have performed, observed and complied with all the obligations and conditions required by the Definitive Agreement to be performed, observed or complied with by it at or prior to the Closing.

(c) Other Transactions. The arrangements and transactions referred to in Paragraphs 2 and 3 shall have been duly made and consummated at or prior to the Closing.

(d) Legislation. The legislation referred to in Paragraph 9(d) (i)-(viii) shall have been enacted and be in full force and effect at and as of the Closing.

(e) Closing Agreement; Rulings and Representations. Conrail and the IRS shall have entered into the Closing Agreement described in Paragraph 4; and Buyer shall have received (at Seller's sole election) either a ruling of the Internal Revenue Service or a written representation and warranty of Seller under the provisions of Paragraph 6(e) to the effect that the amounts paid to employees of Conrail or its affiliates for services rendered after the Closing in order to increase their post-Closing wages to industry standard and the costs paid or incurred for the routing concessions referred to in Paragraph 12(a)(viii) which are otherwise ordinary and necessary business expenses shall not be treated as built-in deductions and Buyer and Conrail (and its affiliates) shall be entitled to deduct them when accrued or paid. Such ruling or representation and warranty, as the case may be, shall be in full force and effect at and as of the Closing.

(f) Certain Facts. The statements set forth on Exhibit C shall be true and correct in all material respects at and as of the Closing.

(g) Absence of Material Adverse Change. There shall have been no material adverse change in the businesses, assets, financial condition or results of operations of Conrail since September 30, 1984.

(h) Document Deliveries. Buyer shall have received satisfactory instruments and documents of the type customarily delivered at closings of transactions of this nature, including, without limitation, a certificate of Seller with respect to the accuracy of Seller's representations and warranties and opinions of counsel to Seller reasonably acceptable to Buyer confirming the legal aspects of Seller's representations, warranties and conditions contained in the Definitive Agreement.

(i) Passenger Service. Conrail's legal status with respect to exemption from responsibility to provide passenger or commuter service shall remain unchanged.

11. Closing. The consummation of the transactions contemplated by the Definitive Agreement shall take place at the Closing, which shall be held at such place as Buyer and Seller shall agree, on (i) such date not later than January 1, 1986, which is five business days after the satisfaction or waiver of the last to be satisfied or waived of the conditions referred to in Paragraphs 9 and 10, or (ii) such other date as Seller and Buyer may agree upon in writing.

12. Post-Closing Covenants; Default.

(a) Affirmative Covenants. The Definitive Agreement shall provide that for a period of five (5) years following the Closing:

(i) Financial Statements. Buyer will furnish to Seller audited financial statements of each of Conrail and/or the Conrail-Buyer consolidated group within 90 days after the end of each fiscal year of Conrail and the Conrail-Buyer consolidated group and unaudited interim financial statements of each of Conrail and/or the Conrail-Buyer consolidated group within 45 days after the end of each quarter (except the fourth quarter); such interim financial statements shall have received such limited review by Conrail's or Buyer's independent certified public accountants as such accountants normally accord to interim financial statements of publicly-held companies.

(ii) Conduct of Business; Maintenance of Existence and Abandonments. (1) Except pursuant to the Divestiture contemplated by Exhibit E, Buyer will cause Conrail and each railroad Subsidiary to continue in the railroad business substantially as such business is now being conducted by Conrail and such railroad Subsidiary and (subject to permitted abandonments and service alterations in accordance with applicable law and the normal procedures and regulations of the Interstate Commerce Commission ("ICC")) to maintain rail freight services throughout its system that are economically justifiable provided, however, that expedited abandonment proceedings commenced pursuant to 45 U.S.C. §748 prior to the Closing may be continued, but no new filings of Notices of Insufficient Revenues may be made pursuant to such Section, and will cause Conrail to maintain its corporate existence and its material licenses and franchises.

(2) Notwithstanding any repeal of Section 308 of the Regional Rail Reorganization Act of 1973, as amended, Buyer will cause Conrail to

continue Conrail's current practice as provided by that Act of offering any line for which an abandonment certificate is issued by the Interstate Commerce Commission ("ICC") to a purchaser who agrees to provide interconnecting rail service. Such offer shall last for the 120 day period following the date of issuance of the abandonment certificate and the price for such abandoned line shall be equal to 75% of net liquidation value as determined by the ICC.

(iii) Property. Buyer will cause Conrail and its Subsidiaries to maintain, preserve, protect and keep their respective properties in good repair, working order and condition in accordance with, and will not permit deferred maintenance contrary to, the maintenance standards for the Norfolk Southern rail system, all so as to provide and maintain rail service as required by Paragraph 12(a)(ii) hereof.

(iv) Insurance. Buyer will cause Conrail and its Subsidiaries to maintain insurance against loss or damage of the kinds customarily insured against by corporations similarly situated.

(v) Capital Spending. Buyer will cause Conrail to spend in each fiscal year the greater of (x) an amount equal to Conrail's depreciation for financial reporting purposes for such year or (y) $500 million, in Capital Spending; provided, however, that in any year, Conrail's Board of Directors may reduce the required Capital Spending for such year to an amount which the Board determines is justified by prudent business and engineering practices; and, further provided, that, in any event, Conrail's cumulative Capital Spending subsequent to the Closing shall not be less than: $350 million on the first anniversary of the Closing, $700 million on the second anniversary of the Closing, $1,050 million on the third anniversary of the Closing, $1,400 million on the fourth anniversary of the Closing and $1,750 million on the fifth anniversary of the Closing.

(vi) Indebtedness. Buyer will cause Conrail and its Subsidiaries to pay all Debt promptly when due and payable.

(vii) Books and Records. Buyer will, and will cause Conrail and its Subsidiaries to, keep proper books and records in which full, true and correct entries of all transactions will be made

in accordance with generally accepted accounting principles (as applicable to companies subject to the reporting requirements of the Securities and Exchange Act of 1934, as amended) applied on a consistent basis ("GAAP").

(viii) Headquarters; Shop Facilities; Routing. Buyer will cause Conrail to: (A) continue to operate from its headquarters in Philadelphia, Pennsylvania; (B) retain its locomotive shop and car repair facilities at Altoona, Pennsylvania; and (C) maintain or re-establish with the small eastern rail carriers of less than $300 million annual operating revenues reasonably direct and cost-competitive routes of major importance.

(ix) Affirmative Action Program. Buyer will cause Conrail to continue its affirmative action program, including specifically but without limitation, its minority vendor program, substantially as such program is now being conducted by Conrail, subject to any provisions of applicable law.

(x) Compliance Certificates. Within forty-five (45) days after the close of each fiscal quarter of Conrail and the Conrail-Buyer consolidated group, and at least forty-five (45) days before the occurrence of any transaction or event described in Paragraph 12(b) (iv) or (vi) Buyer and Conrail shall deliver to Seller a certificate executed by an executive officer or representative of Buyer and an executive officer of Conrail which shall (1) certify that as of such date, and, in the case of any such certificate delivered in connection with a proposed transaction or event, after giving effect thereto, Buyer and Conrail shall have complied, and, after giving effect to such proposed transaction or event, shall then be in compliance with, all of the covenants set forth in Paragraph 12 and that no default exists, or, after giving effect to such proposed transaction or event, would exist, with respect to any such covenant, and (2) set forth all computations necessary to evidence compliance with all of the covenants contained in Paragraph 12 at the date of such certificate, and, in the case of any such certificate delivered in connection with a proposed transaction or event, on a pro-forma basis after giving effect to such transaction or event.

(xi) Notice of Default. Buyer and Conrail will give prompt notice to Seller of any default under any of their respective covenants contained in the Definitive Agreement.

(b) Negative Covenants. The Definitive Agreement shall provide that for a period of five (5) years following the Closing:

(i) Liquidation or Dissolution of Conrail. Buyer will not permit Conrail, absent insolvency, to liquidate, wind-up, dissolve or file for voluntary reorganization under Title 11 of the United States Code or under any other law relating to bankruptcy, insolvency or relief of debtors.

(ii) Sale, Lease, Transfer or Other Disposition of Conrail Assets. Except pursuant to the Divestiture contemplated by Exhibit E, Buyer will not permit to occur any transaction or series of transactions (other than in the ordinary course of Conrail's and its Subsidiaries' businesses) whereby all or any substantial part of the railroad assets and business of Conrail and its Subsidiaries taken as a whole are sold, leased, transferred or otherwise disposed of to any corporation or entity other than a direct or indirect Unrestricted Subsidiary of Conrail.

(iii) Mergers or Consolidations. Buyer will not permit Conrail or any Subsidiary of Conrail to merge or consolidate with or into any corporation or any any other entity, unless, after giving effect to such merger or consolidation:

(A) Buyer will be fully in compliance with all of the covenants enumerated in the Definitive Agreement (including, without limitation, the covenant set forth in Paragraph 12(b)(iv) hereof);

(B) all of the covenants enumerated in the Definitive Agreement shall continue to apply to the surviving or resulting entity of such merger or consolidation fully and to the same extent as they applied to Conrail or to its Subsidiaries (as the case may be) immediately prior to such merger or consolidation; and

(C) such merger or consolidation shall not have violated any of the provisions of Paragraph 12(b)(vii) hereof.

(iv) Anti-Dilution; Holding Period. Buyer will not permit Conrail to issue, sell or contract to issue or sell (whether by way of rights, warrants, options, exchange or otherwise) any shares of any series or class of Conrail's voting stock or any security convertible into any series or class of Conrail's voting stock or enter into any merger or consolidation unless after giving effect to the proposed transaction, Buyer will maintain beneficial ownership of and voting control over at least 51% of each series or class of Conrail's voting stock (assuming the conversion of all securities convertible into any series or class of Conrail's voting stock). Buyer shall not sell, transfer, assign, pledge or hypothecate (except as permitted by the Definitive Agreement), or otherwise alienate or dispose of, in any manner whatsoever, any of its rights, title and interest in any of the shares of Conrail voting stock in which Buyer had any such right, title or interest immediately following the Closing.

(v) Use of Conrail Cash and Assets. In connection with the financing of the Cash Purchase Price: (1) Buyer shall not permit the use of Conrail's cash or cash equivalents on hand, other than in connection with the transactions contemplated by the agreements and arrangements referred to in Paragraph 2 and Exhibit A, and (2) Buyer shall not, and shall not permit Conrail to, subject Conrail's or its Subsidiaries' assets to any pledge, lien, mortgage or other security interest.

(vi) Conrail's Dividends and Distributions.

(1) Common Stock. Except for transactions specifically contemplated by Exhibit D, Buyer will not permit Conrail at any time, in respect of any shares of any class or series of the common stock of Conrail, to:

A. declare or pay any dividends in cash, property or other assets (other than dividends payable solely in shares of any class or

series of the common stock of Conrail) thereon, or

B. apply any of its property or assets to the purchase, redemption or other acquisition or retirement thereof, or

C. set apart any sum for the purchase, redemption or other acquisition or retirement thereof, or

D. make any other distribution, by reduction of capital or otherwise

(all such dividends, payments and distributions in respect of Conrail's common stock being hereinafter referred to as "Common Stock Payments"), except to the extent that each of the conditions set forth below shall have been satisfied:

(i) Such Common Stock Payment is entirely in cash and Buyer and Conrail will, after giving effect to such Common Stock Payment, be fully in compliance with all of the covenants enumerated in this Memorandum of Intent.

(ii) Immediately after giving effect to such Common Stock Payment, the cumulative amount of all Common Stock Payments made subsequent to the Closing shall not exceed (x) 40% of the Cumulative Net Income of Conrail accrued subsequent to the Closing minus (y) the cumulative amount of all Preferred Stock Payments (as defined herein) made subsequent to the Closing.

(iii) Immediately after giving effect to such Common Stock Payment, Conrail shall have cash and cash equivalents on hand at such time not less than the greater of: (a) $500 million, or (b) the sum of (x) $500 million, (y) Net Additional Debt and (z) Net Additional Preferred Stock (the "Formula"); provided, however, that the Formula shall be reduced by an amount (the "Reduction Amount") equal to cumulative Non-Required Capital Spending made by Conrail subsequent to the Closing.

(2) Preferred Stock. Except for transactions specifically contemplated by Exhibit D, Buyer shall not permit Conrail, in respect of any shares of any class or series of Preferred Stock of Conrail, to:

A. declare or pay any dividends in cash, property or other assets thereon, or

B. apply any of its property or assets to the purchase, redemption or other acquisition or retirement thereof, or

C. set apart any sum for the purchase, redemption or other acquisiton or retirement thereof, or

D. make any other distribution, by reduction of capital or otherwise

(all such dividends, payments and distributions in respect of Conrail's Preferred Stock being hereinafter referred to as "Preferred Stock Payments"), except to the extent that each of the conditions set forth below shall have been satisfied:

(i) Such Preferred Stock Payment is entirely in cash, and Buyer and Conrail will, after giving effect to such Preferred Stock Payment, be fully in compliance with the covenants enumerated in Paragraphs 12(a)(v); 12(a)(vi); 12(b)(ii); 12(b)(iii); 12(b)(vi); and 12(c)(iii) of this Agreement.

(ii) Immediately after giving effect to such Preferred Stock Payment, the cumulative amount of all Common Stock Payments and all Preferred Stock Payments made subsequent to the Closing shall not exceed the Cumulative Net Income of Conrail accrued subsequent to the Closing.

(iii) Immediately after giving effect to such Preferred Stock Payment, Conrail shall have cash and cash equivalents on hand at such time not less than $500 million.

(3) Contribution to ESOP. Buyer will not permit Conrail to purchase shares of capital stock of Buyer for the purpose of contributing said shares to an employee plan of Conrail, except as described in Paragraphs 1 and 2 of Exhibit D or except to the extent that each of the conditions set forth in subparagraphs (i) through (iii) of Paragraph 12(b)(vi)(1) have been satisfied as if the expenditures therefor were a Common Stock Payment.

(vii) Transactions with Affiliates.

(A) Fairness of Transactions. Buyer will permit Conrail and its Subsidiaries to enter transactions with Buyer and its non-Conrail Affiliates only if such transactions are (i) in the aggregate fair to Conrail and its Subsidiaries, and (ii) similar in kind and nature to, and documented, recorded, and accounted for in the same manner as, transactions between and among Buyer and its non-Conrail Affiliates.

(B) Prohibited and Indemnified Transactions. Except in implementation of the Memorandum of Intent, Definitive Agreement, or agreements and arrangements referred to in Paragraph 2, Buyer will not permit, or if Buyer does permit, will indemnify Conrail against any loss arising from, any of the following transactions between Conrail or any Subsidiary on the one hand and Buyer or any non-Conrail Affiliate of Buyer on the other hand:

(i) transfer, by merger, assumption or otherwise, of any obligation of Buyer or any non-Conrail Affiliate of Buyer to Conrail or any Subsidiary in an amount greater than the value to the transferree of such merger, assumption, or other transaction;

(ii) loans or advances (those not subject to current settlement) by Conrail or any Subsidiary to Buyer or any non-Conrail Affiliate of Buyer; purchases or other acquisitions by Conrail or any Subsidiary of any capital stock, obligations, or securities of Buyer or any non-Conrail Affiliate of Buyer; capital contributions to or investments in or guarantees of any Debt or obligation of Buyer or any non-Conrail Affiliate of Buyer by Conrail or any Subsidiary (provided, however, that an executive officer or representative of Buyer shall certify to Seller not later than the last business day of each calendar month with respect to the preceding month that each transaction under this paragraph (ii) is fair to Conrail); and

(iii) assignments of any right to receive income for a consideration of less value than such right by Conrail or any Subsidiary to Buyer or any non-Conrail Affiliate of Buyer.

(C) Strength of Rail System. Notwithstanding technical compliance with the requirements of subparagraphs (A) and (B) above, Buyer will not permit Conrail or any Subsidiary to enter any transaction with Buyer or any non-Conrail Affiliate of Buyer which would impair the overall financial position of the Conrail-Norfolk Southern rail system or decrease the overall capability of the Conrail-Norfolk Southern rail system to provide service on a sound basis, provided, however, that Common Stock Payments in compliance with Paragraph 12(b)(vi) may be made.

(viii) No Reversion of Excess Pension Plan Assets; No Termination of Pension Plan. In no event may Buyer obtain, or permit Conrail to obtain, a reversion of any excess assets held in the trust or a successor trust maintained in connection with Conrail's Supplemental Pension Plan or any successor plan. Buyer shall not, and shall not permit Conrail to, terminate Conrail's Supplemental Pension Plan except that if so terminated all Conrail non-agreement employees shall commence to accrue benefits under Buyer's Retirement Plan on the day following any such termination, with full credit for prior Conrail service for purposes of eligibility and vesting.

(ix) Certain Amendments. Buyer shall not permit Conrail to amend, modify, rescind or revoke any provision of Conrail's restated articles of incorporation relating to the relative rights, preferences and limitations of any series or class of capital stock of Conrail held by Buyer immediately after the Closing.

(x) Refund. If, at any time after any Common Stock Payment has been made to Buyer or any Affiliate of Buyer, Conrail shall be unable to make the Capital Spending required to be made pursuant to Paragraph 12(a)(v), Buyer shall promptly refund to Conrail an amount equal to all such Common Stock Payments received by Buyer or an Affiliate of Buyer to the extent necessary to permit Conrail to comply with such requirement.

(xi) Preferred Stock Issuances or Acquisitions. Buyer shall not permit Conrail to issue, sell or contract to issue or sell (whether by way of rights, warrants, options, exchange or

otherwise) to Buyer, and Buyer shall not and shall not permit any Affiliate of Conrail or Buyer to acquire, own or hold (whether through original issuance, purchase or otherwise), any right, title or interest in any shares of any series or class of Preferred Stock of Conrail.

(c) Immediate Post-Closing Covenants. The Definitive Agreement shall contain further affirmative covenants of Buyer to the effect that:

(i) Directors. At the time Buyer obtains control of Conrail, Buyer shall elect such persons to the Board of Directors of Conrail as Buyer shall designate.

(ii) Charter Amendment. At the time Buyer obtains control of Conrail, Buyer shall cause Conrail to amend the restated articles of incorporation of Conrail to authorize a single class of common stock.

(iii) Assumption of Covenants. At the time Buyer obtains control of Conrail, Buyer shall cause Conrail to deliver to Seller instruments and documents satisfactory to Seller evidencing Conrail's assumption of, and agreement to be bound by, each convenant applicable to Conrail set forth in this Paragraph 12 to the same extent as if Conrail were a party to the Definitive Agreement. Such assumption and agreement by Conrail shall be effective at and as of the Closing.

(d) Default. In the Definitive Agreement, Buyer shall acknowledge that any breach or threatened breach of any covenant described in Paragraph 12 shall constitute irreparable harm to Seller. The Definitive Agreement shall provide that Seller shall be entitled to an injunction or injunctions to prevent any breach of any covenant described in Paragraph 12 and to enforce such covenants by a decree or decrees of specific performance in any court of the United States having jurisdiction, in addition to any other remedy to which Seller may be entitled at law or in equity. The Definitive Agreement shall also provide that Buyer irrevocably submits to the jurisdiction of any such federal court over any suit, action or proceeding arising out of or relating to the covenants in Paragraph 12 and Buyer irrevocably waives, to the fullest extent permitted by law, any objection which it may have to the laying of venue of any such suit, action or proceeding brought in such a court or any claim that such

suit, action or proceeding brought in such a court has been brought in any inconvenient forum.

13. Definitions. As used in this Memorandum of Intent, the following terms shall have the following meanings (and all financial and accounting terms used herein and not otherwise defined shall have the respective meanings which such terms have under GAAP) and, in the application of Paragraph 12, this transaction shall be accounted for as a recapitalization of Conrail with a one hundred percent (100%) revaluation of Conrail's assets and liabilities based on the fair value of the new capital structure.

(a) An "Affiliate" of any person, corporation, partnership, joint venture or other entity means any other person, corporation, partnership, joint venture or other entity controlling, controlled by, or under common control with, such person, corporation, partnership, joint venture or entity.

(b) "Capital Spending" means all amounts expended by Conrail and its Subsidiaries for replacements or rehabilitation of, or enhancements to, the railroad plant, property, trackage and equipment of Conrail and its Subsidiaries, all as determined in accordance with GAAP; provided, however, that no amount spent upon normal repair, maintenance and upkeep of such railroad plant, property, trackage and equipment in the ordinary course of business shall constitute Capital Spending.

(c) "Cumulative Net Income" for any period subsequent to the Closing means net income of Conrail and its consolidated Subsidiaries (after provision for income taxes) properly attributable to the conduct of the business of Conrail and its consolidated Subsidiaries, as determined in accordance with GAAP before provision for any Preferred Stock Payments.

(d) "Conrail" means Consolidated Rail Corporation, a Pennsylvania corporation, its successors and assigns by merger, consolidation or otherwise.

(e) "Debt" means (i) all indebtedness, whether or not represented by bonds, debentures, notes or other securities, for the repayment of money borrowed, (ii) all deferred indebtedness for the payment of the purchase price of property or assets purchased, (iii) all guaranties, endorsements, assumptions and other contingent obligations in respect of, or to purchase or to otherwise acquire, indebtedness of others and (iv) all indebtedness secured by

any mortgage, pledge or lien existing on property owned, subject to such mortgage, pledge or lien, whether or not indebtedness secured thereby shall have been assumed.

(f) "Net Additional Debt" means, at any time, an amount equal to the difference between Conrail's consolidated Debt outstanding at such time and Conrail's consolidated Debt outstanding immediately after the Closing.

(g) "Net Additional Preferred Stock" means, at any time, an amount equal to the fair market value of the consideration received by Conrail for the issuance of outstanding Preferred Stock issued subsequent to the Closing.

(h) "Non-Required Capital Spending" means the amount, if any, by which Capital Spending for any fiscal year exceeds the greater of (x) an amount equal to Conrail's depreciation for financial reporting purposes for such year or (y) $500 million.

(i) "Preferred Stock" means any class or series of preferred stock, and any class or series of common stock having liquidation and dividend rights and preferences superior to the Shares.

(j) "Subsidiary" means any corporation more than 50% of whose outstanding voting securities are directly or indirectly owned by Conrail.

(k) "Unrestricted Subsidiary" means any Subsidary in which neither Buyer nor any Affiliate of Buyer (other than Conrail or any of its Subsidiaries) has any interest.

(l) "Excess Cash" means the amount, calculated in accordance with GAAP (as that term is defined in Paragraph 12(a)(vii) hereof) as reflected on Conrail's consolidated balance sheet as at the end of the month immediately prior to the date of Closing, by which Conrail's cash and temporary cash investments exceed the sum of (i) $800 million, (ii) any net increase in total long-term liabilities during the period (the "Measurement Period") from December 31, 1984 to the end of the month immediately prior to the Closing, (iii) to the extent not paid, all sums required to fund the return of employee wages and benefits back to industry levels for the period from July 1, 1984 through the end of the month immediately prior to the date of Closing, (iv) any cash generated from the sale of property and equipment or other non-current assets during the Measurement Period, (v) cash attributable to transactions not in the ordinary course of business and

not consistent with Conrail's prior business practices during the Measurement Period, (vi) any shortfall between currently budgeted capital expenditures and maintenance expenditures in the aggregate and the amount actually expended through the end of the month immediately prior to the Closing, and (vii) any net decrease in the elements of working capital (other than cash and temporary cash investments and reserves for employee wages referred to in (iii) above) during the Measurement Period. The amount, if any, of the Excess Cash, shall be determined at the Closing from the books and records of Conrail and such amount shall be paid to Seller at the Closing as additional consideration for the Shares as provided in Paragraph 1, and the Definitive Agreement shall set forth a mutually acceptable means of resolving any controversy between Buyer and Seller regarding the amount of the Excess Cash.

14. Survival. The Definitive Agreement shall provide that all representations, warranties and agreements of Buyer contained therein, and the representations and warranties of Seller contained in Paragraphs 6(a) and 6(b) hereof, shall survive the Closing until the fifth anniversary of the Closing, and no claim thereon may be first asserted after that time. The Definitive Agreement shall also provide that the representations and warranties of Seller contained in Paragraph 6(e) shall survive the Closing with respect to any liability covered by such representations and warranties or any claim thereon that could have been asserted at any time prior to the fifth anniversary of the Closing and that the representations, warranties and agreements of Seller contained in the Definitive Agreement (other than the representations and warranties of Seller contained in Paragraphs 6(a), 6(b) and 6(e) hereof) shall expire and be terminated and extinguished at and as of the Closing. The Definitive Agreement shall further provide that, without limiting any other right which Buyer may have under applicable law, any claim for breach of the representations and warranties of Seller contained in Paragraph 6(e) may be asserted by Buyer and/or Conrail in accordance with the legislation described in Paragraph 9(d) (viii) hereof. Notwithstanding the first sentence of this Paragraph 14, any statement made by Buyer or Conrail in a certificate furnished to Seller pursuant to Paragraph 12(a)(x) shall survive the Closing, subject to applicable statutes of limitations.

15. Definitive Agreement. Buyer and Seller shall proceed promptly to negotiate the Definitive Agreement, which shall reflect the terms set forth in this Memorandum of Intent and such other and miscellaneous terms and provisions

as are customary in transactions of this type. Buyer and Seller shall use their best efforts to prepare the Definitive Agreement in order to permit the execution and delivery thereof by the parties as soon as practicable following the passage into law of the legislation referred to in Paragraph 9(d).

16. Miscellaneous.

(a) Costs. Each party shall pay the costs incurrred by it in connection with the transactions contemplated by this Memorandum of Intent.

(b) Successors and Assigns. The Definitive Agreement shall provide that such agreement shall bind and inure to the benefit of the parties thereto and their respective heirs, successors and assigns; but no party thereto shall assign any of its rights or delegate any of its duties thereunder without the express written consent of the other parties.

(c) Waiver.

(i) The Definitive Agreement shall provide that Buyer may omit in any particular instance to comply with any covenant, agreement or obligation contained in the Definitive Agreement, if the Secretary (subject to Section 16(c)(ii)) shall, in writing, either waive such compliance in such instance or generally waive compliance with such covenant, agreement or obligation, but no such waiver shall extend or affect such covenant, agreement or obligation except to the extent so expressly waived, and, until such waiver shall become effective, such covenant, agreement or obligation shall remain in full force and effect.

(ii) Any waiver pursuant to Section 16(c)(i) may only be granted if the Secretary determines in writing that such waiver would not impair continued rail service by Conrail and its railroad Subsidiaries or result in a material reduction in the financial strength of Conrail and its Subsidiaries taken as a whole.

(d) Non-Binding. This Memorandum of Intent is not intended to and does not create a binding legal obligation of Seller or Buyer and the understandings set forth herein are subject to the approval and execution of the Definitive Agreement.

(e) No Third Party Benefit. The Definitive Agreement shall provide that notwithstanding any provision therein to the contrary, the Definitive Agreement and any rights or obligations thereunder are not intended and shall not be construed to benefit, or accord any right or claim to, directly or indirectly, any person or entity other than Buyer or Seller.

17. Access to Information. Subject to Buyer's agreeing to satisfactory arrangements to protect confidential information, Seller shall cause Conrail (i) to provide Buyer and its representatives access to such books, records, properties and appropriate personnel of Conrail and its Subsidiaries, and such other information, as Buyer may reasonably request to enable Buyer to develop data on Conrail's rail operations, to prepare to implement the Divestiture contemplated by Exhibit E, to assess Conrail's past, present and future tax position, to ascertain the accuracy of the statements made in Exhibit C or otherwise to ascertain satisfaction of the conditions of Paragraph 10 of this Memorandum of Intent, and (ii) to prepare and submit to Buyer periodic statements between the date hereof and the Closing showing (1) the amount of Excess Cash, determined in accordance with Paragraph 13(1), for the period covered thereby, and (2) reasonably detailed calculations supporting such determination.

THE UNITED STATES OF AMERICA

By Elizabeth Hanford Dole

NORFOLK SOUTHERN CORPORATION

By Robert B. Claytor

EXHIBIT A

SUMMARY OF BUYER'S PROPOSED ARRANGEMENTS
FOR CONRAIL EMPLOYEES

1. Norfolk Southern will provide or cause to be provided cash or Norfolk Southern common stock in a total amount of $375 million, of which an amount determined to be the fair value of the assets and rights of the existing Conrail ESOP shall be contributed by Norfolk Southern to such ESOP.

2. The Conrail common stock held by Conrail Equity Corporation for beneficiaries of the existing Conrail ESOP will be cancelled or transferred to Norfolk Southern.

3. Unless Conrail has already done so, Norfolk Southern will cause Conrail to pay standard wages effective from July 1, 1984.

4. Any Conrail employee wage claims in respect of receipt of less than standard wages, and any rights and options to acquire Conrail stock, will be extinguished.

5. Norfolk Southern will cause the provision of New York Dock protection, including necessary implementing agreements, for employees adversely affected by coordinations between Conrail and Norfolk Southern or its affiliates.

6. Norfolk Southern will cause the provision of one year protection, over a 3-year window of eligibility, for Conrail employees against introduction of efficiencies, subject to a 36-month moratorium on new protective agreements.

7. These arrangements are contingent upon consummation of Buyer's acquisition of the Shares.

Exhibit B

CERTIFICATE AS TO FUNDING

The undersigned, Executive Vice President-Finance of Norfolk Southern Corporation ("Buyer"), hereby certifies pursuant to Paragraph 5 of a certain Memorandum of Intent, dated February 8, 1985, between Buyer and Seller as follows:

Attached hereto is a letter containing the terms of a proposed commitment from The Morgan Bank with respect to a loan proposed to be arranged by such Bank to Buyer in an amount not less than $1.2 billion, which shall constitute the purchase price to be paid by Buyer for the interest of the United States in the common stock, par value $1.00 per share, of Consolidated Rail Corporation.

SWORN TO UNDER PENALTY OF PERJURY THIS 8TH DAY OF FEBRUARY, 1985.

John R Turbyfill

NAME: John R. Turbyfill
TITLE: Executive Vice President
Finance

Sworn and subscribed to before
me this 8th day of February,
1985.

Harold E. Finney

Notary Public

My Commission Expires February 14, 1985

Morgan Guaranty Trust Company of New York
Peter M. Thom
Vice President
23 Wall Street, New York, NY 10015
Telephone 212 483-2323

The Morgan Bank

Norfolk Southern Corporation
1 Commercial Place
Norfolk, Virginia 23510

Attention: Mr. John R. T..byfill
Executive Vice President-Finance

Dear Sirs:

On May 24, 1984 the Morgan Bank indicated the terms and conditions under which we would arrange a syndicated bank credit facility, for up to $1,200,000,000, for the Norfolk Southern Corporation(Norfolk Southern). The purpose of this financing would be to assist Norfolk Southern in its acquisition of Consolidated Rail Corporation (Conrail). You have advised us that Norfolk Southern is in the process of finalizing an agreement of intent with the Department of Transportation (DOT) in connection with the former's bid for Conrail.

We are pleased to reconfirm that these terms and conditions offered by the Morgan Bank on May 24, 1984 continue to be those under which we would arrange such a credit facility. Exhibit I attached represents the summary of these terms and conditions.

The timing of any acquisition of Conrail and the conditions associated with such an acquisition remain undetermined; while this continues to be the case the financial characteristics of a combined Norfolk Southern/Conrail entity cannot be fully determined. Nevertheless, we can reiterate our assurance that should the combined entities demonstrate the financial characteristics you have indicated to us, and Norfolk Southern accepts these terms and conditions, we could commit to arrange such a facility.

For and on behalf of
Morgan Guaranty Trust Company
Of New York,

Morgan Guaranty Trust Company of New York

REVOLVING CREDIT/TERM FACILITY

The indicated terms and conditions of this facility are based on the understanding that, after the acquisition of Conrail, Norfolk Southern Corporation, will retain the financial condition and structure associated with a corporation with a Senior Debt Rating of an "AA/Strong A". These terms and conditions are, therefore, subject to the analysis by the Morgan Bank of the financial projections, prepared by the Norfolk Southern Corporation for the combined Norfolk Southern Corporation/Conrail entity.

Summary Terms and Conditions will include inter alia:

Borrower	Norfolk Southern Corporation
Purpose	Acquisition financing to assist in the purchase of Conrail by the Borrower.
Agent	Morgan Guaranty Trust Company of New York
Lenders	A syndicate of banks arranged by the Agent as agreed to by the Borrower.
Amount	Up to U.S. $1,200,000,000
Availability/Drawdown	The earliest availability date will be the signing date of the facility. Amounts will be drawn in minimum amounts to be agreed.
Final Maturity Date	To be agreed but will be no later than 10 years from the signing date of the facility.

Interest Rate

	LIBOR Basis	CD Basis	Prime Basis
Years 1 - 4	LIBOR + 3/8%	CD + 1/2%	Prime
Years 5 - 8	LIBOR + 1/2%	CD + 5/8%	Prime + 1/8%
Years 9 - 10	LIBOR + 5/8%	CD + 3/4%	Prime + 1/4%

The Prime rate shall be that announced from time to time by the Agent. Under a LIBOR or CD interest rate borrowing, interest will be paid in arrears either at the end of an interest period, or every three months whichever should be earlier. Under a Prime interest rate borrowing interest will be paid quarterly in arrears. (See also Fixed Rate Interest Rate Swap below.)

Interest Periods	LIBOR for 1, 3, 6 or subject to availability 9 or 12 month periods. CD for 30, 60, 90 or subject to availability 180 days. (See also Fixed Rate Interest Swap below.)

Commitment Fee	Effective from the date of the Lenders' commitment to provide the credit facility at a rate of 1/4 of 1% per annum on all undrawn amounts of the facility; payable quarterly in arrears.
Reserves and Withholding Taxes	Payments of principal and interest on the facility and all other amounts payable with respect to commitments are to be made free and clear of any present or future applicable withholding taxes and reserve requirements.
Amortization	Will commence at the end of either the fourth or fifth year (to be agreed) after the signing date and thereafter in equal semi-annual amounts to the final maturity date.
Fixed Rate Interest Rate Swap	The Borrower may wish to fix the interest rate payable under the facility by way of Interest Rate Swaps. The Agent will commit to provide Interest Rate Swaps on amounts of principal of up to $1 billion for selected maturities. Such commitment will be made at a spread over Treasuries and will be set at the date on which the Borrower declares to the Agent the amounts and maturities of interest rate swaps to be arranged (the Declaration Date). From the Declaration Date to the date when the respective interest rate swaps commence, the Borrower will pay the Agent an Interest Rate Swap Commitment Fee of 1/4 of 1% per annum on the amounts declared by the Borrower on the Declaration Date; such fee to be payable quarterly in arrears. Should the Borrower elect not to require the Agent to commit to a spread over Treasuries on the Declaration Date, the interest rate swaps will be arranged by the Agent on a "best efforts" basis.
Agency Administration Fee	$25,000 per annum

All other terms and conditions including but not limited to Financial Covenants, Events of Default, Warranties, Conditions Precedent and Fees are to be agreed between the Borrower and the Agent.

November 19, 1984

This offer is accepted by

_____ Dated

for and on behalf of the Norfolk Southern Corporation
and confirmed by

_____ Dated

for and on behalf of Morgan Guaranty Trust Company of New York

EXHIBIT C

SUMMARY OF STATEMENTS
CONCERNING CONRAIL FOR PURPOSES
OF PARAGRAPH 10(f)

Except as disclosed in writing by Conrail in its Annual Report to the Interstate Commerce Commission for the year ended December 31, 1983 and its 1983 Annual Report:

A. Corporate Matters

1. Each of Conrail and its significant subsidiaries is duly organized, validly existing and in good standing under the laws of its jurisdiction of incorporation.

2. Conrail and each of its significant subsidiaries has the corporate power and authority to own or lease its properties and conduct its businesses as now being conducted.

3. Conrail and each of its significant subsidiaries is duly qualified to do business except where the failure to so qualify would not have a material adverse effect on Conrail and its subsidiaries taken as a whole.

4. The outstanding shares of capital stock of Conrail's significant subsidiaries, which are owned by Conrail, have been duly authorized, validly issued, fully paid and nonassessable and are owned by Conrail free and clear of any claim, lien, encumbrance or agreement (to which Conrail is a party) with respect thereto.

5. The authorized common stock of Conrail consists of 250,000,000 shares of common stock, par value $1.00 per share, of which 29,411,760 shares are issued and outstanding.

B. Financial Statements and Condition

1. The certified consolidated financial statements and subsequent unaudited interim consolidated financial statements, if any, of Conrail and the notes thereto

fairly present the consolidated financial position, results of operations and changes in financial position of Conrail and its subsidiaries and have been prepared in accordance with generally accepted accounting principles applied on a consistent basis.

2. Such statements did not contain any untrue statement of a material fact and did not omit to state a material fact necessary to make the statements therein not misleading.

3. There is no material liability or obligation not reflected or reserved against in the consolidated balance sheet as of September 30, 1984, heretofore delivered to Buyer, or disclosed in the notes thereto, which would be required by generally accepted accounting principles applied on a consistent basis to be so reflected or reserved against and any such reserves have been determined in accordance with GAAP consistently applied.

4. The tax basis of Conrail's assets was accurately reflected in its most recently filed U.S. Corporation Income Tax Return (Form 1120).

5. No disallowance of investment credit or depreciation, interest or any other expense has been made with respect to any transaction which Conrail entered into as a lease under Section 168(f)(8) of the Internal Revenue Code.

C. Assets

Conrail and its significant subsidiaries own all material real properties and all other material assets and properties shown as owned by them on the consolidated balance sheet, and such assets and properties are in each case free of all material mortgages, liens, charges and encumbrances of any nature whatsoever except as disclosed in the notes to such balance sheet or, in the case of assets and properties conveyed pursuant to the Regional Rail Reorganization Act of 1973, as amended, Conrail owns such assets and properties to the extent conveyed to it pursuant to deeds or other conveyance documents authorized by such Act, which ownership is adequate for the operation of Conrail's business as presently conducted.

D. Absence of Change

Since September 30, 1984, there has not been:

1. any material adverse change in the businesses, properties, financial condition, or results of operations of Conrail and its subsidiaries taken as a whole.

2. any material casualty loss, whether or not insured.

3. any material adverse change in the capital stock, long-term debt, or capital lease obligations (except in the ordinary course) other than as contemplated by the Definitive Agreement.

4. any dividend declared or purchase of shares of Conrail capital stock except pre-existing obligations.

5. any merger or consolidation with, or acquisition of substantially all of the property and assets of any other entity by Conrail or its significant subsidiaries, or any sale, lease or exchange of all or any substantial part of the property and assets of Conrail or its significant subsidiaries but only to the extent that any such merger, consolidation, acquisition, sale, lease or exchange would have a material adverse effect on the businesses, properties, financial condition, or results of operations of Conrail and its subsidiaries taken as a whole.

6. any material expenditure not in the ordinary course of business, including, without limitation, for settlement of litigation.

7. any material deviation from Conrail's current capital expenditure plans.

8. any material expenditure for payment before due of any debt or lease obligation.

9. any material change in existing practices for payment of payables and collection of receivables.

10. any legislation enacted (other than that which is contemplated by this Memorandum of Intent or submitted by Seller) the effect of which is, or would be, to subject Conrail, or Buyer in its

capacity as an Affiliate of Conrail, to any cost, burden or restriction which would have a material adverse effect on the properties, financial condition, earnings or businesses of Conrail and its Subsidiaries taken as a whole.

11. any material increase in the wages payable to Conrail's employees other than in the ordinary course of busines; provided, however, that Conrail may increase such wages in order to bring its employees' wages back to industry levels as of July 1, 1984.

12. any combination of events described in D.1 through D.11 above which though not material individually are in the aggregate material.

EXHIBIT D

PERMITTED TRANSACTIONS

1. Purchases by Conrail subsequent to the Closing for an ESOP or ESOP's, provided that Norfolk Southern shall cause Conrail to be reimbursed for any such purchases.

2. The acquisition by Norfolk Southern or cancellation of Conrail common stock under Paragraph 2 of EXHIBIT A, to be accomplished solely with Norfolk Southern assets and not with Conrail assets.

3. Payment by Conrail of a dividend or dividends in a total cumulative amount not in excess of Excess Cash determined under Paragraph 13(1).

U.S. Department of Justice

Antitrust Division

EXHIBIT E

Office of the Assistant Attorney General

Washington, D.C. 20530

January 29, 1985

Honorable Elizabeth H. Dole
Secretary
Department of Transportation
Washington, D.C. 20590

Dear Secretary Dole:

This letter sets forth the Department of Justice's analysis of the competitive implications of a proposed sale of Consolidated Rail Corporation ("Conrail") to Norfolk Southern Corporation ("Norfolk Southern"), as you requested on September 11, 1984. As explained below, on the basis of our independent investigation, we have concluded that, without appropriate divestitures, the proposed merger would violate both Clayton Act and Interstate Commerce Act merger review standards. The merger would have a significant adverse effect on competition for the transport of commodities to and from a number of locations in several states, with the greatest adverse effect occurring at locations along an east-west rail corridor running between Buffalo and Pittsburgh in the east and St. Louis and Chicago in the west. The merger would likely enable the merged entity to achieve certain efficiencies. These efficiencies do not appear, however, to be sufficiently great to offset all of the competitive effects in all of the affected markets.

The Department of Justice therefore would oppose the proposed merger unless its competitive problems are remedied through a prior or concurrent divestiture of assets 1/ that is approved by the Attorney General. Appropriate divestiture must include divestiture of Conrail and/or Norfolk Southern rail assets along the designated corridor to one or more independent acquirers, other than CSX or any entity owned or controlled by CSX, that would provide long-term, viable, and competitive rail service to locations along the corridor. Such divestiture would preserve the vast bulk of the competition that would

1/ "Divestiture" means the conveyance or other transfer by sale, lease, or otherwise of rail tracks and facilities or the right to use rail tracks and facilities.

have been eliminated by the merger. While there may be some possible anticompetitive consequences remaining in some isolated markets after the divestiture, these anticompetitive consequences are likely to be insignificant relative to the merger's expected efficiencies. This precondition to approval of the merger has been set forth in language agreed to by the Departments of Justice and Transportation (attached to this letter as Appendix A) which is to be included in the Agreement of Sale between Norfolk Southern and the Department of Transportation.

Our analysis is explained in detail below.

I. Competitive Analysis

A. Analytical Approach

Although mergers play a beneficial role in our economy, they sometimes may harm competition by creating, enhancing, or facilitating the exercise of "market power." "Market power" is the power of a firm or firms to raise the price of a product or service in a specific market above a competitive level for a significant period of time without fear that existing competitors or new entrants will make such a price increase unprofitable by expanding their output or charging a lower price. When only a few firms in a market into which entry is difficult account for most of the sales of a product, they may either explicitly or implicitly coordinate their actions to eliminate rivalry on price and non-price variables. When firms exercise market power in this way, the result is a transfer of wealth from buyers to sellers and a misallocation of resources that harms the economy. Therefore, a merger that would eliminate a significant competitor in an already highly concentrated market into which entry is difficult may enhance the ability of the remaining firms to exercise market power. Such a merger normally would be challenged by the Department under Section 7 of the Clayton Act unless other economic factors or some appropriate divestiture indicate that the merger should be permitted. 2/

2/ See, U.S. Department of Justice, Merger Guidelines, June 14, 1984. The standards used by the Department to analyze mergers under the Clayton Act are substantially the same as those used by the Interstate Commerce Commission, which is directed by statute to approve only transactions that are "consistent with the public interest." 49 U.S.C. § 11344. In applying this standard, the Commission disapproves transactions that would "substantially reduce the transport alternatives available to shippers unless there are substantial and demonstrable benefits to the transaction that cannot be achieved in a less anticompetitive fashion." General Policy Statement for Merger on Control of at Least Two Class I Railroads, 49 C.F.R. § 11801(a).

We analyzed this proposed merger according to the same standards and principles that we apply to mergers generally. As with any merger, our first step was to identify economically relevant markets--product-location combinations which could be subject to the exercise of market power--in which both Conrail and Norfolk Southern operate. Our next step was to identify "problem" markets (i.e., product-location combinations) with respect to which the merger would result in significantly high post-merger concentration and where entry by new firms (for example, trucking companies) would be difficult or unlikely in response to the exercise of market power following the merger. Once we identified the markets in which the merger would likely have a significant anticompetitive effect, we then considered whether these anticompetitive effects might be offset by efficiencies resulting from the merger. Finally, we considered what would be required to resolve any competitive problems that might be raised by the merger--that is, to prevent a reduction in the number of competing rail alternatives in highly concentrated markets where considerable revenues are involved and where the merger would otherwise be likely significantly to diminish competition.

B. Methodology

We defined two types of economically relevant markets for the purpose of analyzing this proposed merger--(1) transportation of a commodity to a location ("destination markets") and (2) transportation of a commodity from a location ("origin markets"). 3/ In addition to railroads, non-rail

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3/ We identified commodity and location combinations using the five-digit Standard Transportation Commodity Codes ("STCCs") and four-digit Standard Point Location Codes ("SPLCs"), respectively, designated in the 1983 ICC 1% Waybill Sample. Five-digit STCCs were used because, for the most part, the products in a single five-digit group are close substitutes for one another and have similar transportation characteristics. A four-digit SPLC is in most cases a county, although, in a significant number of cases, a single county may contain two or more four-digit SPLCs.

Usually, the relevant geographic market will be as small as a county. However, even if in some cases the market may be broader, the competitive analysis would be the same because in markets located along the east-west corridor towards which our proposed remedy is directed, there are at most four competing railroads before the merger. In addition, where we knew with some certainty that the market was broader than a county, we incorporated this into our analysis. For example, we analyzed separately outbound shipments of corn, wheat, and soybeans, as well as the movement by rail of coal to utility plants. Producers of these commodities tend to be able to select among transportation alternatives that extend beyond county lines through the use of a combination of rail and nonrail movements.

transportation modes, such as truck and barge, were considered to be in the market to the extent they appeared to be close substitutes for rail transportation.

To identify those markets in which the merger might have a significant adverse effect (i.e., would result in high post-merger concentration and would significantly increase pre-merger concentration), we first identified markets (product-location combinations) where in 1983 Conrail and Norfolk Southern each participated (independently of one another) in at least 10 percent of the rail movements and where together the two railroads accounted for at least 50 percent of all rail movements in the market. 4/ Using 1977 Census of Transportation data, supplemented by surveys and interviews with over 200 shippers concerning approximately 700 facilities, we then eliminated those markets where non-rail competition appeared to be significant. Finally, we employed a number of other screens designed to eliminate from further consideration those markets in which over a significant portion of the route into the destination or out of the origin market in question, a single carrier other than Conrail or Norfolk Southern provides rail service, in which the total revenues affected were small, or in which the major shipper in the market supported the merger.

Using this screening procedure, we identified more than one hundred markets located in 39 counties in 21 states in which it appeared that a merger between Conrail and Norfolk Southern could have a significant anticompetitive effect. With respect to these markets, Conrail and Norfolk Southern participated in movements involving $516.1 million in rail revenues in 1983. Of the 39 counties, 15 had 'problem' markets in which Conrail or Norfolk Southern participated in movements involving less than $5 million of revenues. If these 15 counties had been the only locations potentially affected by the merger, we would not oppose the merger, given the likely efficiencies that would

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4/ Although in some of the markets shippers can now be served only via the tracks of either Conrail or Norfolk Southern, but not both, many of these shippers nevertheless consider other carriers identified on the Waybill to be competitive alternatives because of 'reasonable' reciprocal switching arrangements currently in place. One factor that probably keeps the switching rates of Norfolk Southern and Conrail low enough to allow competition in these markets is the fact that the two carriers rely on each other for switches into different markets and each might feel constrained from unilaterally exercising its full market power (by raising the switching rates at locations it alone controls) for fear that the other railroad would retaliate in other locations. Thus, even where shippers can be reached only by the tracks of Conrail or Norfolk Southern, the merger may eliminate competition that resulted from reciprocal switching.

result from the merger and given the fact that the commerce affected as to these 15 counties is so small compared to the actual overall volume of commerce involved in the merger. Even after eliminating these counties, however, a number of others remain and the potentially affected revenues in these counties are substantial enough to be of significant concern. The remaining counties include, among others, Wayne and Washtenaw counties in Michigan; Allen and Marion counties in Indiana; Erie county in New York; and Cuyahoga, Jefferson, Lucas, Stark, and Lorain counties in Ohio, as well as several counties in the southern United States that originate shipments of pulp, paper, and fiberboard products destined for locations served by Norfolk Southern and/or Conrail in the Midwest and Northeast. 5/ In two of these counties, Jefferson county in Ohio and Allen county in Indiana, our concern is particularly acute because the number of competing railroads would be reduced from two to one. In the other counties, the competitive situation would not be much better, because the number of rail alternatives would be reduced either from three to two or from four to three. We have determined that, although they are used by shippers to some limited extent, non-rail transport alternatives are inadequate substitutes for rail transport in these markets.

We also considered the argument that following the merger, the combined entity would divert so much interchange traffic from regional railroads in the northeast and midwest that some of these railroads would be unable to compete effectively in the markets they currently serve and that the resulting loss of competition would reduce consumer welfare. We find, however, that, as a general matter, it is extremely difficult to estimate the size of future diversions. 6/ It may be even more difficult to determine whether such diversions would be so substantial as to render otherwise viable regional railroads incapable of providing competition in markets where they currently operate and where their exit would reduce competition significantly. Because diversions often result from lower costs to railroads of providing single-line, rather than interline, service and because single-line service is often attractive to shippers, any potential harm in markets currently served by regional carriers

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5/ A complete listing of the product-location combinations identified through our screening methodology is attached to this letter as Appendix B. This listing is limited to counties in which in 1983 the potential problems identified involved Norfolk Southern's and Conrail's participation in rail revenues exceeding $2 million.

6/ While we have received diversion estimates from a number of sources, including the Department of Transportation, Norfolk Southern, Conrail, and some regional carriers, these estimates vary considerably and it is very difficult to draw firm conclusions from them.

must be weighed against possibly substantial benefits. Hence, even if we knew with certainty that such diversions would significantly impair the operations, or even the viability, of regional railroads, this would not demonstrate that the diversions are, on balance, harmful to the economy. To the extent that they may be harmful, however, the divestiture that we have proposed in Section II of this letter would address that problem by ensuring that there will be an opportunity for regional carriers to continue receiving interline traffic from independent carriers other than Norfolk Southern or Conrail.

C. Efficiencies

The primary benefit of mergers to the economy is their efficiency-enhancing potential, e.g., their ability to lower overall production costs to the benefit of society. Some mergers that would significantly increase concentration in a market nevertheless result in significant real efficiencies. Therefore, if the parties to a merger establish by clear and convincing evidence that a merger will achieve such efficiencies, the Department considers those efficiencies in evaluating the merger.

As stated in the Department's Merger Guidelines, 7/ cognizable efficiencies include, but are not limited to, economies of scale, better integration of operating facilities, and similar efficiencies relating to specific operations of the merging firms. The Department also considers claimed efficiencies resulting from reductions in general administrative and overhead expenses, and other efficiencies that otherwise do not relate to specific operations of the merging firms, although, as a practical matter, those types of efficiencies are more difficult to demonstrate and to quantify. The Department does not give weight to claimed efficiencies if comparable savings reasonably could be achieved by the parties through means short of a merger likely to reduce competition.

We have reviewed efficiency claims made by Norfolk Southern. We believe that some of these claims are overstated, 8/ while others, such as abandonment of unprofitable track, would probably occur even in the absence of a merger. Nevertheless, we believe, based in part on interviews with affected shippers, that substantial benefits are likely to

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7/ U.S. Department of Justice, Merger Guidelines, June 14, 1984, at Section 3.5.

8/ For example, Norfolk Southern's estimated annual savings of $139 million due to the elimination of redundant personnel and facilities is highly speculative given the unpredictable results of union labor negotiations.

result from increased single-line service, an option that is in many cases both less costly to railroads and more desirable to shippers.

On balance, we have concluded that the possible benefits of the proposed merger are not sufficiently great to outweigh the very serious anticompetitive effect the merger would have, particularly in the designated east-west corridor. The potential efficiency gains--particularly relating to the offering of single-line service--are, however, likely to be sufficiently great to offset the less significant adverse competitive effects that would remain after the divestiture outlined in Section II of this letter is effected.

II. Proposed Remedy

As discussed above, although the proposed merger would have an anticompetitive effect in a number of markets, the markets of primary concern are located along a rail corridor bounded on the east by Buffalo and Pittsburgh and on the west by Chicago and St. Louis. Accordingly, we believe that a sale of Conrail to Norfolk Southern must be expressly conditioned on the prior or concurrent divestiture 9/ of rail assets to an independent entity or entities capable of providing long-term, viable, and competitive rail service along this corridor. For these purposes, "divestiture" means the conveyance or other transfer by sale, lease, or otherwise, of rail tracks and facilities or the right to use rail tracks and facilities.

To ensure competitive service, the divestiture must satisfy three conditions. First, the acquirer or acquirers (hereinafter "acquirer") must demonstrate to the satisfaction of the Attorney General that it possesses the managerial, operational, and financial capability necessary to compete effectively, and to remain a viable entity providing long-term rail service along the designated corridor.

Second, the divestiture should provide the acquirer direct connections in Buffalo, Chicago, Toledo, and East St. Louis to one or more railroads other than the the merged carrier or CSX Corporation or any railroad controlled by either of them. This condition is essential to the competitive viability of an alternative rail line because traffic to and from the affected markets moves not only on Conrail and Norfolk Southern lines, but also, to a significant extent, off those lines to or from

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9/ Concurrent divestiture may involve a transaction such as a contract between Norfolk Southern and a purchaser to transfer assets acquired from Conrail. Such a contract could become effective as at the closing of the sale of Conrail to Norfolk Southern.

connections with other railroads in Buffalo, Chicago, Toledo, and East St. Louis. Therefore, an independent connection to other railroads at each of these gateways would have to be available so as to remove the acquirer's need to rely upon the merged carrier or CSX to make these connections. 10/

Third, following the divestiture, in each of the designated counties in the east-west corridor, the merged Norfolk Southern/Conrail entity must switch cars between its tracks and facilities and the tracks and facilities of any shipper served by Norfolk Southern, Conrail, or Norfolk Southern/Conrail on customary terms and conditions whenever switching is practicable and necessary in order to provide a shipper with effective competitive access to the track and facilities of the acquirer.

The specific rail tracks and facilities to be divested and the consideration to be paid should be determined by agreement between the parties to the divestiture so that the market, rather than the Department of Justice, can determine the most suitable divestiture alternative. Because the divestiture would be subject to the Attorney General's approval, however, to assist him in evaluating the divestiture the Department of Justice should be supplied with complete information concerning all offers and inquiries received in connection with the divestiture, including those that are rejected by either the Department of Transportation or Norfolk Southern. 11/

This proposed divestiture addresses the vast majority of the larger "problem" markets we identified. While several markets are not affected by the proposal, these markets are either located in areas where a divestiture would be impractical or are locations where the amount of commerce shared by Conrail and Norfolk Southern was less than $5 million. When an independent rail alternative able to maintain competition within the designated corridor is found, such divestiture would resolve at least $371.4 million of potential problems out of a total of $516.1 million in the markets we have identified. In addition, this remedy would benefit some shippers, such as pulp, paper, and fiberboard producers located in 11 "problem" counties in the South, whose goods pass through or terminate in this corridor.

10/ The Toledo gateway would give shippers in Wayne and Washtenaw counties in Michigan access to a railroad other than Norfolk Southern/Conrail and CSX that provides a direct link to eastern and western destinations via Buffalo, Chicago, and East St. Louis.

11/ These terms and conditions are set forth in Appendix A and, we understand, will be included in the Agreement of Sale between the Department of Transportation and Norfolk Southern.

Finally, as discussed above, we have determined that the efficiencies that are likely to result from the proposed merger would be substantial enough to offset the potential anticompetitive effect in markets that are not directly addressed by the proposed divestiture.

III. Conclusion

I trust that this letter is responsive to your request for the Department's advice concerning the competitive impact of a sale of Conrail to Norfolk Southern. I would like to thank you and your staff for the competent and willing assistance that has been provided to us throughout our review process.

Sincerely,

J. Paul McGrath

J. Paul McGrath
Assistant Attorney General
Antitrust Division

Attachment A

"Divestiture" means the conveyance or other transfer by sale, lease, or otherwise of rail tracks and facilities owned or operated by CR or NS or the right to use such rail tracks and facilities.

"NS" means Norfolk Southern Corporation, its subsidiaries, affiliates, successors and assigns.

"CR" means Consolidated Rail Corporation, its subsidiaries and affiliates.

"CSX" means CSX Corporation, its subsidiaries, affiliates, successors and assigns.

1. This Agreement of Sale is contingent upon prior or concurrent Divestiture sufficient to enable an acquirer or acquirers ("acquirer(s)"), not controlled as control is defined in 49 U.S.C. §10102 by NS/CR or CSX, to provide rail service along a rail corridor bounded on the West by Chicago and E.St. Louis and on the East by Buffalo and Pittsburgh, with service to, from, and between the following counties in that rail corridor: Erie, New York; Cuyahoga, Lorain, Jefferson, Lucas, and Stark, Ohio; and Allen and Marion, Indiana. Subject to the requirements of paragraph (5) with respect to Marion County, Indiana, such rail service may be limited to service along those sold or leased rail lines where prior to divestiture shippers had service by both NS and CR. Such rail service shall include direct connections in Buffalo, E.St. Louis, Toledo and Chicago to a railroad or railroads not controlled by NS/CR or CSX as control is defined in 49 U.S.C. §10102.

2. The rail tracks, rights and facilities divested pursuant to paragraph (1) and the consideration paid therefor shall be determined by agreement between NS and the acquirer(s).

3. The Divestiture required by paragraph (1) shall be made to acquirer(s) who shall have demonstrated to the Department of Justice that they will be able to provide long-term, viable, competitive rail service along the rail corridor(s) and to, from and between the counties enumerated in paragraph (1), as indicated by their having managerial, operational, and financial capability necessary to compete effectively in the provision of such rail service. The Divestiture required by paragraph (1) may not be accomplished without the prior approval by the Attorney General of its terms and conditions and of the acquirer(s).

4. Following the execution of this Agreement of Sale, NS shall promptly solicit offers to purchase, lease, or operate upon property to be divested in accordance with paragraph (1). NS shall keep records of its efforts to accomplish the Divestiture required by paragraph (1), including the identification of any person or persons expressing an interest to any officer or official of NS, and the terms and conditions of each offer, and shall allow the Department of Justice access to such records. NS shall immediately notify the Department of Justice of the details of any offer related to the Divestiture required by paragraph (1). If NS rejects any such offer, it shall promptly notify the Department of Justice and fully describe the reasons for such rejection.

5. It is further agreed that following Divestiture NS, CR, or NS/CR shall switch cars, on terms and conditions customary at other locations within the region of the Divestiture, between the tracks and facilities of the acquirer(s) and the tracks and facilities of any shipper physically served by NS, CR, or NS/CR and open to service by both as of the date hereof, at each of the counties specified in paragraph (1) whenever such switching is practicable and necessary in order to provide a shipper with effective competitive access to the tracks and facilities of the acquirer(s). Following Divestiture, in Marion County, Indiana, NS, CR or NS/CR shall establish switching charges at levels no higher than those customarily charged at other locations within the region of the Divestiture for switching cars between the tracks and facilities of the acquirer(s) and the tracks and facilities of any shipper served by NS, CR or NS/CR as of the date hereof. If there is a dispute as to whether such switching is practicable and necessary, or as to such customary conditions and compensation for such switching, such dispute shall be resolved within six months by an arbitration procedure governed by the rules of the American Arbitration Association. In respect of such requirements for practicable and necessary switching of cars, the acquirer(s) and the directly affected shipper(s) shall be entitled to enforce this paragraph, in each such instance, for their sole benefit.

Attachment B

MARKETS IN COUNTIES WITH REVENUE PROBLEMS OF $2 MILLION OR MORE

ST=AL

	SPLC	COUNTY	STCC5	PRODUCT
ORIG	4759	DALLAS	26111	PULP
ORIG	4783	WILCOX	26311	FIBERBOARD, PAPERBOARD OR PULPBOARD

ST=AR

	SPLC	COUNTY	STCC5	PRODUCT
ORIG	6118	JEFFER	26311	FIBERBOARD, PAPERBOARD OR PULPBOARD

ST=FL

	SPLC	COUNTY	STCC5	PRODUCT
ORIG	4936	TAYLOR	26111	PULP

ST=GA

	SPLC	COUNTY	STCC5	PRODUCT
DEST	4685	DOUGHE	26111	PULP
ORIG	4655	GLYNN	26311	FIBERBOARD, PAPERBOARD OR PULPBOARD
ORIG	4637	MACON	26111	PULP

ST=IL

	SPLC	COUNTY	STCC5	PRODUCT
ORIG	3877	CHAMPA	20921	SOYBEAN OIL,CRUDE OR REFINED
ORIG	3922	MACON	20419	FLOUR OR OTHER GRAIN MILL PRODUCTS,NE
ORIG	3922	MACON	20463	CORN SUGAR
DEST	3876	VERMIL	28711	SUPERPHOSPHATE
DEST	3876	VERMIL	40211	IRON OR STEEL SCRAP,WASTES OR TAILINGS
ORIG	3876	VERMIL	20413	CORN MEAL OR FLOUR
ORIG	3876	VERMIL	20419	FLOUR OR OTHER GRAIN MILL PRODUCTS,NE
ORIG	3876	VERMIL	20923	SOYBEAN CAKE,FLOUR,GRITS,MEAL OR OTHE

ST=IN

	SPLC	COUNTY	STCC5	PRODUCT
ORIG	3642	ADAMS	20923	SOYBEAN CAKE,FLOUR,GRITS,MEAL OR OTHE

MARKETS IN COUNTIES WITH REVENUE PROBLEMS OF $2 MILLION OR MORE

ST=IN

	SPLC	COUNTY	STCC5	PRODUCT
DEST	3616	ALLEN	11212	PREPARED BITUMINOUS COAL
DEST	3616	ALLEN	26311	FIBERBOARD, PAPERBOARD OR PULPBOARD
DEST	3616	ALLEN	26471	SANITARY TISSUES OR HEALTH PRODUCTS
DEST	3616	ALLEN	40211	IRON OR STEEL SCRAP,WASTES OR TAILING
DEST	3616	ALLEN	41114	ARTICLES, USED
ORIG	3616	ALLEN	37149	MOTOR VEHICLE ACCESSORIES OR PARTS,NE
ORIG	3616	ALLEN	40211	IRON OR STEEL SCRAP,WASTES OR TAILING
ORIG	3682	CLINTO	20923	SOYBEAN CAKE,FLOUR,GRITS,MEAL OR OTHE
DEST	3687	MARION	11212	PREPARED BITUMINOUS COAL
ORIG	3687	MARION	20411	WHEAT FLOUR
ORIG	3687	MARION	20413	CORN MEAL OR FLOUR
ORIG	3687	MARION	20462	CORN STARCH
ORIG	3687	MARION	20923	SOYBEAN CAKE,FLOUR,GRITS,MEAL OR OTHE
ORIG	3623	ST JOS	37112	MOTOR TRUCKS OR TRUCK TRACTORS,ASSEMB

ST=KY

	SPLC	COUNTY	STCC5	PRODUCT
ORIG	2865	JEFFER	28212	SYNTHETIC RUBBERS
ORIG	2865	JEFFER	36321	HOUSEHOLD REFRIGERATORS OR HOME OR FA

ST=LA

	SPLC	COUNTY	STCC5	PRODUCT
ORIG	6451	ASCENS	49057	FLAMMABLE COMPRESSED GASES
ORIG	6451	ASCENS	49066	FLAMMABLE LIQUIDS, THERMALLY UNSTABLE

ST=MA

	SPLC	COUNTY	STCC5	PRODUCT
DEST	1482	HAMPDE	26311	FIBERBOARD, PAPERBOARD OR PULPBOARD

ST=MI

	SPLC	COUNTY	STCC5	PRODUCT
ORIG	3167	INGHAM	37149	MOTOR VEHICLE ACCESSORIES OR PARTS,NE
DEST	3193	KALAMA	26311	FIBERBOARD, PAPERBOARD OR PULPBOARD
DEST	3193	KALAMA	33123	IRON OR STEEL SHEET OR STRIP
ORIG	3194	WASHTE	37149	MOTOR VEHICLE ACCESSORIES OR PARTS,NE

MARKETS IN COUNTIES WITH REVENUE PROBLEM $2 MILLION OR MORE

ST=MI

	SPLC	COUNTY	STCC5	PRODUCT
DEST	3181	WAYNE	20841	WINE,BRANDY OR BRANDY SPIRITS OR FRUI
DEST	3181	WAYNE	26213	PRINTING PAPER,COATED OR UNCOATED,
DEST	3181	WAYNE	37149	MOTOR VEHICLE ACCESSORIES OR PARTS,NE
DEST	3181	WAYNE	41114	ARTICLES, USED
ORIG	3181	WAYNE	37111	MOTOR PASSENGER OR AIR CARS,ASSEMBLED
ORIG	3181	WAYNE	37149	MOTOR VEHICLE ACCESSORIES OR PARTS,NE
ORIG	3181	WAYNE	41114	ARTICLES, USED
DEST	3183	WAYNE	41114	ARTICLES, USED
ORIG	3183	WAYNE	37111	MOTOR PASSENGER OR AIR CARS,ASSEMBLED
ORIG	3183	WAYNE	37112	MOTOR TRUCKS OR TRUCK TRACTORS,ASSEMB
ORIG	3183	WAYNE	37142	MOTOR VEHICLE ACCESSORIES
ORIG	3183	WAYNE	37147	MOTOR VEHICLE BODY PARTS
ORIG	3183	WAYNE	41114	ARTICLES, USED

ST=MO

	SPLC	COUNTY	STCC5	PRODUCT
DEST	5675	ST LOU	33125	STRUCTURAL SHAPES OR PILING,STEEL EXC
DEST	5675	ST LOU	37149	MOTOR VEHICLE ACCESSORIES OR PARTS,NE
ORIG	5675	ST LOU	37149	MOTOR VEHICLE ACCESSORIES OR PARTS,NE

ST=MS

	SPLC	COUNTY	STCC5	PRODUCT
ORIG	4893	ADAMS	26111	PULP

ST=NC

	SPLC	COUNTY	STCC5	PRODUCT
ORIG	4033	WASHIN	24211	LUMBER,ROUGH OR DRESSED,OR REDWOOD C
ORIG	4033	WASHIN	26213	PRINTING PAPER,COATED OR UNCOATED,
ORIG	4033	WASHIN	26311	FIBERBOARD, PAPERBOARD OR PULPBOARD

ST=NY

	SPLC	COUNTY	STCC5	PRODUCT
DEST	1854	ERIE	1195	POTATOES, OTHER THAN SWEET
DEST	1854	ERIE	20411	WHEAT FLOUR
DEST	1854	ERIE	20452	PREPARED FLOUR MIXES
DEST	1854	ERIE	20995	MIXED LOADS OF FOOD OR KINDRED PRODUC
DEST	1854	ERIE	24321	PLYWOOD OR VENEER OR BUILT-UP WOOD
DEST	1854	ERIE	26311	FIBERBOARD, PAPERBOARD OR PULPBOARD
ORIG	1854	ERIE	33123	IRON OR STEEL SHEET OR STRIP
ORIG	1854	ERIE	37149	MOTOR VEHICLE ACCESSORIES OR PARTS,NE

MARKETS IN COUNTIES WITH REVENUE PROBLEMS OF $2 MILLION OR MORE

ST=OH

	SPLC	COUNTY	STCCS	PRODUCT
DEST	3418	CUYAHO	11212	PREPARED BITUMINOUS COAL
DEST	3418	CUYAHO	24321	PLYWOOD OR VENEER OR BUILT-UP WOOD
DEST	3418	CUYAHO	26213	PRINTING PAPER,COATED OR UNCOATED,
DEST	3418	CUYAHO	26211	FIBERBOARD, PAPERBOARD OR PULPBOARD
DEST	3418	CUYAHO	26471	SANITARY TISSUES OR HEALTH PRODUCTS
DEST	3418	CUYAHO	41114	ARTICLES, USED
ORIG	3418	CUYAHO	33121	STEEL INGOT OR SEMI-FINISHED SHAPES
ORIG	3418	CUYAHO	40211	IRON OR STEEL SCRAP,WASTES OR TAILING
ORIG	3418	CUYAHO	40241	PAPER WASTE OR SCRAP
DEST	3419	CUYAHO	20421	COOKED CEREALS,FLAKED,GRANULATED,POPP
DEST	3419	CUYAHO	26311	FIBERBOARD, PAPERBOARD OR PULPBOARD
DEST	3419	CUYAHO	26471	SANITARY TISSUES OR HEALTH PRODUCTS
DEST	3419	CUYAHO	41114	ARTICLES, USED
DEST	3461	HANCOC	20621	SUGAR,GRANULATED OR POWDERED,SUGAR CU
ORIG	3461	HANCOC	36311	HOUSEHOLD RANGES,OVENS OR SURFACE COO
DEST	3472	JEFFER	10111	IRON, DIRECT-SHIPPING ORES, CRUDE
DEST	3472	JEFFER	11212	PREPARED BITUMINOUS COAL
DEST	3472	JEFFER	32741	LIME OR LIME PLASTER
DEST	3472	JEFFER	40211	IRON OR STEEL SCRAP,WASTES OR TAILING
ORIG	3472	JEFFER	33121	STEEL INGOT OR SEMI-FINISHED SHAPES
ORIG	3472	JEFFER	33123	IRON OR STEEL SHEET OR STRIP
ORIG	3472	JEFFER	33127	TIN MILL PRODUCTS
ORIG	3472	JEFFER	40211	IRON OR STEEL SCRAP,WASTES OR TAILING
ORIG	3422	LORAIN	29914	COKE PRODUCED FROM COAL
ORIG	3422	LORAIN	33124	IRON OR STEEL BARS,BAR SHAPES OR RODS
ORIG	3422	LORAIN	33126	IRON OR STEEL PIPE,TUBES OR FITTINGS
ORIG	3422	LORAIN	40211	IRON OR STEEL SCRAP,WASTES OR TAILING
ORIG	3422	LORAIN	41114	ARTICLES, USED
DEST	3431	LUCAS	26811	FIBERBOARD, PAPERBOARD OR PULPBOARD
ORIG	3431	LUCAS	1139	GRAIN,NEC
ORIG	3431	LUCAS	20411	WHEAT FLOUR
ORIG	3431	LUCAS	20412	WHEAT BRAN, MIDDLINGS OR SHORTS
ORIG	3431	LUCAS	20419	FLOUR OR OTHER GRAIN MILL PRODUCTS,NE
ORIG	3431	LUCAS	20431	COOKED CEREALS,FLAKED,GRANULATED,POPP
ORIG	3431	LUCAS	28125	POTASSIUM COMPOUNDS
ORIG	3431	LUCAS	29914	COKE PRODUCED FROM COAL
ORIG	3431	LUCAS	49057	FLAMMABLE COMPRESSED GASES
DEST	3449	STARK	40211	IRON OR STEEL SCRAP,WASTES OR TAILING
ORIG	3449	STARK	33124	IRON OR STEEL BARS,BAR SHAPES OR RODS
ORIG	3459	WYANDO	32959	NONMETALLIC MINERALS OR EARTHS,GROUND

ST=PA

	SPLC	COUNTY	STCCS	PRODUCT
DEST	2161	BUTLER	40211	IRON OR STEEL SCRAP,WASTES OR TAILING

MARKETS IN COUNTIES WITH REVENUE PROBLEMS OF $2 MILLION OR MORE

ST=SC

	SPLC	COUNTY	STCC5	PRODUCT
ORIG	4478	CHARLE	26311	FIBERBOARD, PAPERBOARD OR PULPBOARD

ST=TN

	SPLC	COUNTY	STCC5	PRODUCT
ORIG	4273	MCKINN	26212	GROUND WOOD PAPER, UNCOATED

ST=TX

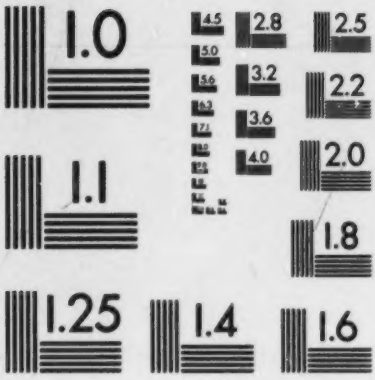
	SPLC	COUNTY	STCC5	PRODUCT
ORIG	6B47	HARRIS	28151	CYCLIC INTERMEDIATES FROM BENZENE,
ORIG	6B47	HARRIS	28212	SYNTHETIC RUBBERS
ORIG	6B47	HARRIS	49122	COMBUSTIBLE LIQUIDS, POLYMERIZABLE
DEST	6B48	HARRIS	26212	GROUND WOOD PAPER, UNCOATED
DEST	6B48	HARRIS	33126	IRON OR STEEL PIPE,TUBES OR FITTINGS
ORIG	6B48	HARRIS	26213	PRINTING PAPER,COATED OR UNCOATED,

ST=VA

	SPLC	COUNTY	STCC5	PRODUCT
ORIG	2624	HOPEWE	26311	FIBERBOARD, PAPERBOARD OR PULPBOARD
ORIG	2624	HOPEWE	28191	AMMONIA OR AMMONIUM COMPOUNDS

ST=WI

	SPLC	COUNTY	STCC5	PRODUCT
ORIG	3231	DOUGLA	20411	WHEAT FLOUR
ORIG	3231	DOUGLA	26613	WALLBOARD



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